No. 12,561

IN THE

United States Court of Appeals

For the Ninth Circuit

LIBBY, MCNEILL & LIBBY (a corporation),
Appellant,

vs.

ALASKA INDUSTRIAL BOARD, composed of the Territorial Insurance Commissioner, Attorney General of Alaska and the Territorial Commissioner of Labor, and JOHN LANDRO,
Appellees.

BRIEF FOR APPELLANT.

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Appellees.

BRIEF FOR APPELLANT.

STATEMENT OF PLEADINGS AND FACTS.

A. JURISDICTIONAL STATUTES.

The Workmen's Compensation Act of Alaska (full text, Appendix A) provides:

> "Section 15. PROCEDURE IN DISPUTED CLAIMS. If the employer and the injured employee, or his or her beneficiaries, disagree in regard to the compensation payable under this Act, or, if they have reached such an agreement, which has been signed by him, her or them and has been filed with and approved by the Industrial Board as provided in Section 6, and afterwards disagree

as to the continuance of payments under such approved agreement, or as to the period for which payments shall be made, or as to the amount to be paid, or if a dispute arises for any other reason, either party may then make application to the Industrial Board for the determination of the matters in dispute.

Upon the filing of such application, the Board shall set the date of hearing, which shall be as early as practicable, and shall notify the parties, in the manner prescribed by the Board, of the time and place of such hearing. Such hearings shall be held in the district in which such injury occurred, unless, for the convenience of witnesses or other good cause, the Board determines that such hearing should be held elsewhere.

All disputes arising under this Act, if not settled by agreement as in this Act provided, shall be determined by the Board; and nothing in this Section contained shall be construed to affect the continuing jurisdiction of the Board as provided in Section 4 nor to prevent such Board from making any investigation on its own motion.

The Industrial Board, by any or all of its members, shall hear the parties, their representatives and witnesses, and shall determine the dispute in a summary manner. The award shall be filed with the record of the proceedings, and a copy thereof shall immediately be sent to each of the parties."

Section 43-3-15, ACLA 1949, Volume 2.

The act further provides:

"Section 16. Review By Full Board. If an application for review is made to the Industrial Board within ten days from the date of an award,

made by less than all the members, the full Board, shall review the evidence, or, if deemed advisable, hear the parties at issue and their representatives and witnesses as soon as practicable, and shall make an award and file the same with the findings of fact on which it is based, and shall send a copy thereof to each of the parties forthwith."

Section 43-3-16, ACLA 1949, Volume 2.

The act further provides:

"Section 22. COURT REVIEW: QUESTION OF LAW. An award of the Board, by less than all of the members, as provided in Section 15, if not reviewed as provided in Section 16, shall be final and conclusive.

An award by the full Board shall be conclusive and binding as to all questions of fact; but either party to the dispute, within thirty days from the date of such award, if the award is not in accordance with law, may bring injunction proceedings, mandatory or otherwise, against the Industrial Board, to suspend or set aside, in whole or in part, such order or award. Such proceedings shall be instituted in the United States District Court for the District in which the injury occurred. The orders, writs and processes of the court in such proceeding may run, be served, and be returnable in accordance with the rules of said court, but the return day and hearing thereon shall not be later than sixty days after the institution of such proceedings. The payment of the amounts required by such award shall not be stayed pending final decision in any such proceeding unless, upon application for an inter-

locutory injunction, the court on hearing, after not less than ten days' notice to the parties and the Industrial Board, allows the stay of such payments, in whole or in part, where substantial damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such substantial damage would result to the employer, and specifying the nature of the damage. * * *"

Section 43-3-22, ACLA 1949, Volume 2.

The act further provides:

"Section 25. JURISDICTION OF COURT. No court of this Territory, except the United States District Court on review, or the United States Circuit Court of Appeals on appeal, shall have jurisdiction to review, vacate, set aside, reverse, correct, amend or annul any order or award of the Industrial Board or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the Industrial Board in the performance of its duties."

Section 43-3-25, ACLA 1949, Volume 2.

Section 1291 of the new Federal Judicial Code provides:

"Section 1291. Final Decisions of District Courts. The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin

Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929."

Title 28, USCA Judiciary and Judicial Procedure, Section 1291.

B. PLEADINGS.

"Application for Adjustment of Claim" filed with Board by appellee Landro, dated March 24, 1949 (R. 38-40).

"Admission of Service and Answer to Application" filed with Board by appellant, dated May 26, 1949 (R. 40-42), in which appellant gave notice "The defendant will insist that all evidence must be adduced according to legal rules for the admission of evidence and it is otherwise inadmissible, and will object to all *ex parte* evidence offered to prove or seek to prove any of the facts upon which the claimant bases his claim; and the defendant will insist upon having a hearing before the full membership of the board." (R. 41-42).

Written objections (R. 43) were also served and filed with the Board before the hearing by Appellant, namely:

"4. That it contends that evidence must be adduced in a legal manner, and not ex parte, and is entitled to the right of cross-examination of all of claimant's witnesses."

"5. That it demands a hearing before the full board with all members of the board present."

"6. That the law does not authorize or permit a hearing to be held upon the extent of alleged temporary disability and a later hearing upon partial permanent disability."

"7. That claimant has, if any, only one claim."

Appellee Landro gave his testimony by deposition (R. 44-56) on May 26, 1949, See Appendix B for proof of date. Subsequently a hearing was held before the full Board (R. 32) on June 27, 1949. Proof of date see Appendix B.

At the hearing appellee Landro's deposition (R. 44-56) was received in evidence, in addition to which the Board, over appellant's objections (R. 41-42; and 43), considered and treated as evidence the unverified letters to appellee Landro's attorney of Dr. L. E. Williams of May 20, 1949 (R. 36), and possibly also of Dr. E. A. LeCocq of February 4, 1949 (R. 85-87).

At the hearing the appellant put in evidence the deposition of Dr. O. J. Fortun (R. 57-69) and of Dr. A. Bernard Gray (R. 11-30).

The full Board on June 28, 1949, made its decision and award (R. 32-35) in which it found that appellee Landro sustained temporary total disability from July 6, 1948, to May 20, 1949, but that appellant had paid him compensation therefor only through September 30, 1948, (R. 33) and that he was entitled to further temporary total disability compensation of $2577.96 for the period from October 1, 1948, to May

20, 1949, but made no finding as to any permanent disability (R. 34).

Appellant appealed from the Board decision to the District Court of the Third Judicial Division of Alaska, within which division the injury occurred, which Third Judicial Division transferred the proceedings to the First Judicial Division for trial. Complaint and Appeal (R. 2-8). For transfer, see R. 83.

All parties stipulated that appellee Landro might be made a party defendant in the cause before the District Court (R. 37).

Appellee Landro filed his answer (R. 37) in which he denied the allegations of paragraph IX (R. 5-6) but otherwise did not deny any of the allegations of the "Complaint and Appeal" (R. 2-8), so the District Court tried the appeal as though appellee Landro had demurred to appellant's Complaint and Appeal.

The Alaska Industrial Board did not move or otherwise plead to appellant's Complaint and Appeal.

After a hearing (R. 71) before the District Court, it rendered its written opinion (R. 72-74) on February 23, 1950, in which it sustained the Board's decision and award.

The District Court on March 24, 1950, entered its judgment allowing appellee Landro temporary total disability compensation of $2,577.96 (which with interest totalled $2,805.00) for the period from October 1, 1948, to May 20, 1949, and also for costs and disbursements, including an attorney fee of $200.00 (R.

74-75), and therein decreed the finality of said judgment as to such temporary total disability compensation (R. 74).

Appellant gave notice of appeal on March 28, 1950, and filed on April 3, 1950 (R. 76).

Appellant made and filed its supersedeas on appeal which was approved as to form, amount, and sufficiency of surety by appellee Landro and was approved and the appeal allowed on April 3, 1950, by the judge of the District Court (R. 76-79).

Appellant served and filed its Statement of Points on April 18, 1950 (R. 79-82).

Appellant served and filed its designation of contents of the record on appeal on April 18, 1950, (R. 88-89).

Appellee Landro by designation (R. 84) included in the record the unverified, ex parte letter of Dr. Le Cocq of February 4, 1949 (R. 85-87).

C. FACTS.

Appellee Landro, while employed by Libby, McNeill & Libby, as a fisherman at its Ekuk salmon cannery, Bristol Bay, which is in the Third Judicial Division of Alaska, on July 5, 1948, sustained an injury arising out of and in the course of his employment when he slipped in jumping from a scow to a boat in rough weather (R. 38-39; also 44-45).

Appellant at that time was engaged in the operation of a salmon cannery at Ekuk, Alaska, and had in its employ three or more employees (R. 2-3).

Appellee Landro's evidence consisted of his own testimony (R. 45-56), and of Dr. L. E. Williams' letter of May 20, 1949, to attorney Roy E. Jackson (R. 36) and of Dr. E. A. Le Cocq's letter of February 4, 1949, to attorney Jackson (R. 85-87).

Appellant's evidence consisted of Dr. O. J. Fortun's deposition (R. 57-69), and Dr. A. Bernard Gray's deposition (R. 11-30).

The Board rendered its decision and award on June 28, 1949 (R. 35), but notice thereof was not given to appellant until July 8, 1949 (R. 5). The Complaint and Appeal was filed with the Clerk of the District Court of the Third Judicial Division on July 28, 1949 (See Appendix B), and was filed upon transfer thereto by the Clerk of the District Court of the First Judicial Division on August 6, 1949 (R. 83).

Final judgment was entered by the District Court of the First Judicial Division on March 24, 1950, awarding the appellee Landro temporary disability compensation of $2,577.96, which with interest then amounted to $2,805.00 (R. 74-75), the appellant having paid Landro $680.76 prior to the filing of his claim (R. 39).

QUESTIONS PRESENTED.

Appellant's "Statement of Points" (R. 79-82) makes six points upon which appellant relies, but which appellant believes can be presented by two questions inasmuch as appellant, upon further consideration thereof, doubts it can herein raise that inferentially involved by the Board's reservation until some indefinite future date whether or not appellee Landro suffered any permanent, either partial or total, disability because seemingly that question should be raised when and if the Board makes such a determination.

Neither of these two questions, so far as appellant is informed, has ever been presented either to this or to the lower court, except in what might be termed the companion case No. 12562 of this Court.

The first of these questions was presented at the hearing before the Board by appellant's "Admission of Service and Answer to Application" and also by its written Objections filed with the Board (R. 43) and in the District Court by Appellant's "Complaint and Appeal," particularly by Paragraph IX thereof (R. 5-6), the allegations of which Paragraph IX were put in issue by appellee Landro's Answer (R. 37).

First—Appellant contends that the Workmen's Compensation Act of Alaska (Full text, Appendix A) does not authorize the Board to base its Findings, Decision and Award upon Ex parte, hearsay, unverified, or other incompetent evidence.

This rule is supported by many decisions, hereinafter cited, and, inasmuch as the Board's Findings, Decision and Award were based solely upon ex parte, hearsay, unverified, or other incompetent evidence, those Findings were not conclusive upon the District Court; hence, it should have based its Judgment upon the only competent evidence that was adduced at the hearing before the Board and modified the Board's Findings to adjudge that appellee Landro's temporary total disability ended October 1, 1948, and that he sustained no permanent disability as a result of the accidental injury upon which he based his claim.

Second—Appellant contends that the District Court for the Territory of Alaska has no jurisdiction to allow, in a review before it on appeal of the Alaska Industrial Board's Finding, Decision and Award, an attorney fee to the successful litigant in that appeal; hence, that the District Court erred in its Judgment (R. 75) in adjudging that appellant should pay appellee Landro an attorney fee of $200.00.

Appellant submits the Workmen's Compensation Act of Alaska (Full text—Appendix A) is a special procedural Act and that the only compensation payable to an injured employee is that specified by the Act; hence, that allowance of costs with "a reasonable attorney's fee to be fixed by the Court," under Section 55-11-55, ACLA 1949, Volume 3, is inapplicable; and that the amount of an attorney's fee of $200.00 would constitute additional compensation which is not authorized by the Act.

This question was raised by oral exception to the Judgment and by serving and filing appellant's Statement of Points (Point 6, R. 82).

ARGUMENT.

(A) AWARD MUST BE BASED UPON COMPETENT EVIDENCE.

Question 1 (Points 1-5, R. 79-82).

As early as May 26, 1949, both the Board and the appellee Landro were informed by appellant by demand therefor made by the latter in its Answer (R. 40-42) that appellant would insist that all evidence be adduced according to legal rules for the admission of evidence or that it would otherwise be inadmissible and object to all ex parte evidence offered to prove or seek to prove any of the facts upon which the appellee Landro based his claim.

Furthermore, at the hearing appellant served and filed its written objections to the same effect, and also that the Board was not authorized to hold a hearing upon the extent of alleged temporary disability and a later hearing upon the question of partial permanent disability, and that the appellee Landro had, if any, only one claim (R. 43).

The Board's Findings that appellee Landro had been totally temporarily disabled from July 5, 1948, to May 20, 1949, that is the period thereof from October 1, 1948, to May 20, 1949, and was entitled to temporary disability compensation of $2,577.96 for

the period from October 1, 1948, to May 20, 1949 (R. 34), affirmed by Judgment (R. 75), is not based upon any legal or competent evidence.

To the contrary it was based solely upon either ex parte or hearsay evidence.

Appellee Landro's only evidence was his personal testimony (R. 44-56) and an unverified ex parte letter to Landro's attorney of Dr. Williams of May 20, 1949 (R. 36), and possibly the Board also considered Dr. Le Cocq's unverified ex parte letter to Landro's attorney of February 4, 1949 (R. 85).

Landro gave his oral testimony by deposition (R. 44-56) before the Board. While he first claimed he had never previously suffered from any disease, or had an accident or laid off from work because of sickness (R. 51), later he admitted he had an operation for a peptic ulcer and also had been treated for a compound fracture (R. 56).

His testimony in nowise shows termination of total temporary disability on May 20, 1949, although intimates it had ended at some indefinite previous date by his statement that his condition "is up and down. It is not good at all. It is such that I could not do any hard work of pulling. There are days that I might be able to do light work but other days I couldn't begin to do any work at all." (R. 49).

His testimony if not directly at least impliedly is that in the accident he hurt his back (R. 45-46). If we understand Dr. Le Cocq's letter of February 4,

1949 (R. 85-87), correctly, Landro told the doctor that he, Landro, had had something wrong with his back prior to the accident, because Le Cocq said that Landro on February 4, 1949, had an increased dorsal rotundum with secondary accentuated compensatory lumbar lordosis, which "is actually on a postural basis but has been severely aggravated by his fall on July 5, 1948" (R. 87).

Without conceding the credibility of or any probative weight to the testimony of Landro, we assume, for the purposes of the argument, that a person claiming an injury, even though a layman, may properly testify that he is still partially or totally disabled from performing his work; also that a lay witness may properly testify from personal knowledge to the manner in which a person, who claims to have been injured, does his work after the receipt of the claimed injury.

But, Landro was a layman, and while doubtless he could properly testify, for instance, that his right forearm was swollen or black and blue on a particular day or days, or to any other objective injury, and Landro himself could testify that he suffered pain, weakness, or physical impairment, and a lay witness, who witnessed it, could testify that Landro by his conduct or expression evinced pain or suffering, yet, being laymen, the testimony of neither is admissible to prove subjective injuries, such as are claimed here, the character, extent and future effect of which can be only known to experts in human anatomy, or that

Landro's physical condition at the time he testified was caused by his claimed injury; hence, no inference can be properly based upon such if any testimony as he did give, that any subjective symptoms of which Landro claimed to be suffering at the time of giving his testimony, were due to his accident.

Landro in his "Application for Adjustment of Claim" claims in question 1, "back became very painful, had to stop work, and has resulted in severe injury to lower lumbar back, producing a stiff, painful back, and inability to work." (R. 39).

Nor does he claim any objective injury nor is there any evidence of any objective injury such as a black eye, broken arm, mashed finger.

The first sentence of Dr. Williams' letter of May 20, 1949 (R. 36), did also indicate that Landro told the doctor of nothing other than relative to an injury to his lower back.

The letter of Dr. Le Cocq of February 4, 1949 (R. 85), also indicates that Landro confined his complaint to his lower back.

His claim is actually premised (R. 39) upon his having suffered subjective or internal injuries, none of which disclosed their presence upon the surface of his body where they would be the object of a witness' eyes.

Only an expert in human anatomy is qualified to testify as to the character, extent and future effect,

if any, of the internal injuries he claims to have suffered.

> "Where, however, the injuries or pain are subjective and of such a character that laymen cannot know with reasonable certainty the cause, extent, or their future effect, then there must be offered evidence by expert witnesses, learned in human anatomy, who can testify from a personal examination or from knowledge of the history of the case or from a hypothetical question based on the facts as to the matter involved in the suit."
>
> *Schwartz Trial of Automobile Cases,* Second Edition, Pages 429, 430;
>
> *Sickmund v. Conn. Co.* (Conn.) 189 At. 876;
>
> *Shawnee-Tecumseh Traction Co. v. Grigg,* (Okla.) 151 P. 230.

If this were not the rule there would be no sense in calling a medical expert or qualifying him as such for his testimony.

The distinction is perhaps no better shown than that a layman can testify as to another's evincing pain, but he is not qualified to testify whether that expression of pain is feigned or real. A medical expert must be called to testify to that. The layman can only testify to the facts as he observes them.

Pierson v. Ill. C. R. Co., 123 N.W. (Mich.) 576.

Landro, being a layman, was not qualified to testify that any subjective symptom of ailment suffered by him was caused by such, if any, injury as he accidentally sustained on July 5, 1948.

The point is that a layman has no such knowledge of human anatomy as to be able to do anything but guess as to the cause of a subjective symptom.

Thus, remote and unusual effects of physical injuries such as cancer or tuberculosis would call for more than a layman's knowledge of cause and effect.

Hickenbottom v. D.L. & W. R. R. Co., 25 NE (NY) 279;

Schwartz Trial of Automobile Cases, Second Edition, Page 453.

Having in nowise qualified himself as an expert in human anatomy, Landro's testimony, either direct or implied, that his present condition is the effect of his injury is nothing more than surmise, and his opinion is incompetent.

> "A person injured may testify to the effects of an injury or operation upon him, and what is the resulting condition, provided that, unless he is an expert his answer states only facts of knowledge and consciousness, and not opinions, requiring professional skill to form justly."
>
> *Abbott on Facts* (Vesselman's 5th Ed.) P. 1227, Sec. 857.

Abbott on Facts cites the following cases in support of his thesis, i.e.:

> One, not an expert, cannot testify that the effect of a blow on his ear was to produce deafness.
>
> *Stevens v. Rodger,* 25 Hun. (N.Y.) 54, and
>
> One not an expert, cannot testify that his head will never be the same as it was.
>
> *Pfau v. Alteria,* 52 N.Y.S. 88.

Abbott on Facts further states:

> "The opinions of medical experts as to the causes of death, injury, or other particular physical condition are admissible as evidence upon the ground that such witnesses have *peculiar knowledge or skill* with reference to the particular subject matter in question. Such opinions are therefore admissible where they are *inferences of skill* derived either from observation or from *scientific deductions* from given facts. So, *an expert* who has examined an injured person or the body of one deceased may state *his opinion* as to what was the cause of the wound or other injury thereon or the cause of death." (Emphasis supplied).
>
> *Abbott on Facts* (Vesselman's 5th Ed.) P. 375, Section 256 (d).

The testimony of Landro was thus incompetent because of his incompetency to testify as to the extent, duration and cause of his physical condition. Thus reducing Landro's evidence to the unverified ex parte letter of Dr. Williams of May 20, 1949, (R. 36) and of Dr. Le Cocq of February 4, 1949 (R. 85-87).

Dr. Williams' unverified letter of May 20, 1949 (R. 36), clearly intimates that the examination was not made by a physician of a patient to prescribe remedies for the patient's illness, but solely to bolster up appellee Landro's claim for compensation.

It says that Landro's "complaints are the same as previously"—seemingly as on March 19th—"and the objective physical findings are the same."

It also plainly indicates that at some prior unmentioned date—possibly March 19th—Landro's condition then was the same as on May 20, 1949, because the Doctor said: "I would still estimate his disability as 40% of the maximum of unspecified permanent partial disabilities."

Therefore, this letter admits that Landro's temporary total disability, instead of having continued to May 20, 1949, as found by the Board (R. 34), affirmed by judgment (R. 75), had ended on some previous indefinite date, perhaps March 19th, or at least two months prior to the date to which both the Board and the District Court say appellant must pay total temporary disability compensation to appellee Landro.

Dr. LeCocq's examination of Landro on February 4, 1949, was patently not made as for the purpose of a physician to prescribe to an ailing patient; but, at the request of Landro's attorney to bolster up Landro's claim (R. 85).

All of the statements in the first paragraph (R. 85) are hearsay based upon what Landro told LeCocq.

The doctor ventures no statement whatsoever as to Landro's temporary or permanent disability, other than to state "It is felt that his condition is not fixed and that definite further treatment is in order at this time." (R. 87).

The letter contains not a word to the effect that Landro's total temporary disability would or should

end May 20, 1949, or that Landro had not already recovered his full wage earning capacity, other than the plain hearsay statement made to him by Landro, "In regard to work, he has not been able to work since the accident." (R. 85).

If LeCocq's letter is competent evidence of any fact, which appellant does not concede, it is proof that Landro had not suffered an original injury on July 5, 1948, but at most only aggravated some previous condition of his back, because, as already noted, in that letter Dr. LeCocq said that Landro had an increased dorsal rotundum, with secondary accentuated compensatory lumbar lordosis, which "is actually on a postural basis but has been severely aggravated by his fall incurred on July 5, 1948." (R. 87).

Repetition of statements made by Landro to Drs. Williams and LeCocq, because they were doctors are no more admissible than though they were laymen, and are inadmissible under the hearsay rule that such statements are not admissible unless brought within some exception, such as being part of the *res gestae,* of the hearsay rule. These particular statements disclose that they do not come within any exception to that rule.

Landro's statements to those doctors on the occasions reported upon by them in their letters were not involuntary exclamations of pain by Landro. Neither were they declarations made to those physicians so that the latter could prescribe curative remedies to him.

His statements made to them and used by them in writing those letters we submit are within the rule, namely:

> "A clear distinction is drawn, however, between involuntary exclamations of pain and evidence of simple declarations by the plaintiff made some time after the injury that he was then suffering pain. Such evidence is of a totally different nature, the likelihood of gross exaggeration being so much greater. Evidence of complaints of pain is therefore inadmissible unless made to a physician for the purpose of receiving treatment."
>
> *Schwartz Trial of Automobile Accident Cases,* (2nd Edition), Page 438,

citing:

Roche v. Brooklyn C. & N. R. Co., 105 N.Y. 294;

West Chicago S.R. Co. v. Kennelly, 48 N.E. 996;

Cashin v. N.Y.N.H. & H.R. Co., 70 N.E. 930;

Sund v. Chicago R. I. & P. Co., 204 N.W. 628;

Davidson v. Cornell, 132 N.Y. 132, 228, 237.

This rule is also expressed:

> "Declarations made by one injured to his attending physician are admissible when they relate to the part of his body injured, his suffering symptoms and the like; but, *not if they relate to the cause of the injury.* This rule is more rigorously applied to lay witnesses. Chicago & A.R.

Co. v. Industrial Board, 113 N.E. 629." (Emphasis supplied).

Spiegel's House Furnishing Co. v. Industrial Com., 123 N.E. 606, 6 ALR 543.

Also:

Shaughnessy v. Holt, 86 N.E. (Ill.) 256, annotated in 21 LRA (NS) 826.

However, Dr. Williams' letter of May 20, 1949 (R. 36), is the only basis of the Board's finding that Landro's total temporary disability continued until May 20, 1949 (Award, R. 34).

This conclusion of appellant seemingly is justified by the fact that the examination of Dr. Williams is the only one mentioned in the Board's award (R. 33). Moreover, Dr. LeCocq in his letter of February 4, 1949 (R. 85-87), made no prediction whatever as to when and if Landro's condition on February 4, 1949, would change or become fixed; in fact, he could not possibly have guessed that it would become fixed on May 20, 1949, some three and one-half months in the future.

Dr. Fortun testified in no manner as to when whatever Landro's condition was when he examined him would end or change, nor could he possibly have predicted that Landro would suffer total temporary disability until May 20, 1949, nine months in the future.

Dr. Gray testified in his opinion that Landro's total temporary disability ended on October 1, 1948 (R. 17, R. 22).

It thus clearly appears that solely upon the testimony of appellee Landro and the letter of Dr. Williams of May 20, 1949 (R. 36), and of Dr. LeCocq of February 4, 1949 (R. 85-87), the Board based its decision and award (R. 32-35) awarding Landro total temporary disability of $2577.96 for the period from October 1, 1948 to May 20, 1949 (R. 34), appellant having previously paid Landro total temporary disability compensation of $680.76 for the period from August 1, 1948, to September 30, 1948 (R. 39), and, despite his disablement on July 5, 1948, the season run money and wages of $1972.00 for the season's two months' work (R. 52), Landro having started to fish on June 28, 1948 (R. 45).

Logically, if Dr. Williams' letter of May 20, 1949 (R. 36) is credible and competent evidence of Landro's total temporary disability having ended on May 20, 1949, then it also is equally credible and competent evidence of Landro's having sustained 40% permanent disability, because he estimated Landro's then disability "as 40% of the maximum for unspecified partial disabilities" (R. 36).

But, the Board ignored that statement and held that it was unable to find what, if any, permanent total disability Landro had sustained (R. 34), which finding was at least impliedly affirmed by the Court's opinion (R. 72-74) and Judgment (R. 74-75).

As a matter of fact, the court in its opinion said, "it may be conceded that the evidence preponderates in" appellant's favor, on the appellant's contention

that the Board's findings as to total temporary disability were not supported by substantial evidence (R. 73), which point was raised by sub-paragraphs 4, 5, and 6, paragraph IX (R. 5-6) of its "Complaint and Appeal."

Appellant adduced the testimony by deposition of Dr. O. J. Fortun (R. 58-69). Dr. Fortun had been in the general practice of medicine for about 30 years (R. 58-59).

He was the first physician to examine Landro and found that the latter suffered what is "sometimes called lumbago from exposure to rain and cold winds," which examination was made on July 15, 1948 (R. 60).

He treated Landro with salicylates and physiotherapy, which was mostly infra-red light and massage, "things you give for sore back," but he found no external evidence on the skin of any injury whatsoever, although he made an examination for that purpose (R. 61).

He admitted that he was not a specialist in treating spinal injuries (R. 65) and that having no x-ray machine he did not take an x-ray picture of Landro's back (R. 64), but maintained under a rigid cross-examination that Landro was suffering from lumbago (R. 68).

He said nothing about termination of either temporary total disability or permanent, either partial or total disability.

Appellant also adduced the testimony by deposition of Dr. A. Bernard Gray, who specializes in orthopedic and traumatic surgery and who has had a rather varied, extensive experience (R. 11-12). He first examined Landro on July 23, 1948 (R. 12), who told him that he had no previous back trouble, which statement was directly contrary to what Landro must have told Dr. LeCocq as claimed by the latter in his letter of February 4, 1949 (R. 87).

Dr. Gray said that Landro, at the time of the examination on July 23, 1948, was up and around and was living in a hotel in Seattle (R. 13). Dr. Gray's rather extensive examination, including the taking of x-rays of both views of the lower spine and stereoscopic x-rays, revealed no evidence of any injury of the fourth lumbar vertebra or of injury about the body thereof (R. 16).

Dr. Gray hospitalized and treated Landro by bed rest, physiotherapy and applications of lumbar sacral brace over a period of time until October 15, 1948, but he made his last examination of Landro on October 29, 1948, which indicated that Landro's condition had been stationary for at least four weeks, and he was of the opinion that Landro was fit to go to work (R. 17).

His diagnosis of Landro was an acute contusion and strain of the lower spine which occurred July 5, 1948, and which resulted in symptoms which gradually subsided and of Landro's upper spine as due to infectious myositis or rheumatism of the muscles

of the dorsal spine but that the myositis had no relation to Landro's accident (R. 19).

Dr. Gray stated that in his opinion Landro's subjective symptoms represented a disability of 10% and he recommended that, if his claim was in order, it would be closed on such an award (R. 18) and that no evidence existed of any disability of the lower spine on clinical examination but Landro did complain of the lower spine tiring more easily; hence, there being no objective evidence of disability he placed his award on the basis of Landro's subjective symptoms (R. 19).

On cross-examination Dr. Gray also stated that a so-called degenerative arthritis of the spine was indicated to some extent in the region of Landro's fourth and fifth lumbars, but he found no evidence of a narrowing of the fifth intervertebral disk space posteriorly (R. 20-21); also that he felt that Landro's temporary disability had terminated on October 1, 1948 (R. 22).

Dr. Gray again saw Landro in March, 1949 (R. 23), but he did not treat Landro at that time. The doctor said "I saw him, and he was having trouble, and I wanted to see that he got some care, but he came in to see me because he wanted my opinion, and I told him that I didn't think that this related to the condition for which I had treated him, and I gave him the best advice that I could." (R. 26).

The general rule is,

> "Where medical proof is required, it must be furnished either by producing the doctor for examination and cross examination or by his deposition taken pursuant to law. The Doctor's unverified report or declaration not made in Court, will be insufficient."
>
> *Schwartz Trial of Automobile Cases,* Second Edition, Page 430,

citing:

> *Lindquist v. Triedelson,* 248 N.Y. Suppl. 775;
> *Francisco v. Circle, etc. Co.* (Ore.) 265 P. 801;
> *Godkin v. Brooklyn, etc. Corp.,* 269 N.Y. Suppl. 809.

This rule is not obviated because this hearing is under the Alaska Workmen's Compensation Act which provides:

> ". . . Process and procedure under this Act shall be as summary and simple as reasonably may be . . ."
>
> Section 43-3-14, ACLA 1949, Volume 2.

> ". . . The Industrial Board, by any or all of its members, shall hear the parties, their representatives and witnesses, and shall determine the dispute in a summary manner. . . ."
>
> Section 43-3-15, ACLA 1949, Volume 2.

The Act nowhere sanctions the use of incompetent or hearsay evidence upon which to base the Board's findings.

To the contrary, the Act empowers the Board to administer oaths.

> ". . . The Board or any member thereof shall have the power for the purpose of this Act to subpoena witnesses, administer or cause to have administered oaths, and to examine or cause to be examined such parts of the books and records of the parties to a proceeding as relate to questions in dispute . . .
>
> "The District Court, on application of the Industrial Board or any member thereof, shall enforce, by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and records."
>
> Section 43-3-14, ACLA 1949, Volume 2.

What sense or consistency could there be to administer an oath to either an employer or an employee if he personally appeared to testify before the Board, and on the other hand to consider as evidence an unverified, ex parte letter written by either an employer, an employee, or even a physician, which he mailed or handed to the Board?

The use of such unverified, ex parte letters by either employer or employee can only lead to fraud, deceit and lies, without opportunity to the other to expose such fraud, deceit and lies by cross-examination.

The Act also provides:

> "When an application for review is made, the full Board, if the first hearing was not held be-

> fore the full Board, shall review the evidence, or, if deemed advisable, hear the parties at issue and their representatives and witnesses as soon as practicable . . ."
>
> Section 43-3-16, ACLA 1949, Volume 2.

These and other provisions of the Act plainly indicate its intent that the hearing shall not be a Star Chamber proceedings, but shall be held, though summarily, in an orderly, legal, quasi-judicial manner.

The language of the Act, namely:

> "Process and procedure under this Act shall be as summary and simple as reasonably may be."
>
> Section 43-3-14, ACLA 1949, Volume 2,

is not peculiar to Alaska. It is found in workmen's compensation statutes of various other jurisdictions. That language has been stated by an authoritative work on Workmen's Compensation Laws to bar hearsay.

> "Other state legislatures did not abolish all common rules" (for workmen's compensation hearings). "They provided that 'Process and procedure should be as simple and summary as reasonably may be.' Procedure was simplified. Simple forms were used. The mail replaced the sheriff. Hearsay was taboo and should not even be admitted in evidence."
>
> *Horovitz Injury and Death under Workmen's Compensation Laws* (1944), Page 242.

Even in jurisdictions where the administrative tribunal of such statutes may dispense with the tech-

nical rules of evidence, an evidentiary rule of substance is often retained.

> "It is manifest, however, that the rule against hearsay is not technical but vitally substantial and may not properly be disregarded under such statutory provisions without grave danger of collusion, imposition, and injustice. If a claimant be permitted to make out a case upon the essential facts of accidental injury upon hearsay testimony alone, there is no limit to the frauds and wrongs that may be encouraged and made possible."
>
> *Lallier Construction Co. v. Industrial Commission,* 17P2 (Col.) 534.

American Jurisprudence says:

> "It may be stated as a general rule that, in the absence of any statutory sanction therefor, hearsay evidence is not admissible in a proceeding before a compensation board or commission, unless it falls within one of the established exceptions to the rule of exclusion."
>
> 58 *Am. Jur.* 863, Sec. 445,

citing an Illinois decision which held not only that hearsay was inadmissible but also that evidence was inadmissible where the adverse party had been denied the right of *cross-examination,* viz.:

> "The sole question raised in this case is whether or not there is any competent evidence in the record showing that the death of Cloyes was caused by an injury which arose out of and in the course of his employment. The oral testi-

mony bearing upon that question, heard before the arbitrator, and the Industrial Commission over the plaintiff in error's objection, was hearsay and incompetent. That testimony consisted of statements of the witnesses of what the deceased told them about when, where, and how he received the injury, and what he was doing at that time. No one testified who had any knowledge of those facts, except from the statements made to them by the deceased. Declarations made by one injured to his attending physician are admissible when they relate to the part of his body injured, his suffering, symptoms, and the like, but not if they relate to the cause of the injury. This rule is more rigorously enforced when applied to lay witnesses. Chicago & A. R. Co. v. Industrial Board, 274 Ill. 336, 113 NE 629.

* * * * * * *

"It is a well-known and well-recognized rule that the evidence of a witness or witnesses, dead or alive, in any suit, although prosecuted to final judgment, is not admissible against any third party in another suit who was not a party to such judgment. The main ground upon which this rule is based is that such third party had no right of cross-examination of such witness or witnesses. The evidence of witnesses before the coroner's jury, dead or living, is not admissible against either party in a civil suit for damages, and for the same reason as above given. Pittsburgh, C. & St. L. R. Co. v. McGrath, 115 Ill. 172, 3 N.E. 439; Knights Templars' & M. Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N.E. 1066. If the evidence of the witnesses before the coroner's jury is not receivable against a party

in the civil suit growing out of the death of the party over whose body the inquest is held, and the judgment and findings of a court in another suit concerning the same death are not admissible, there is no sound reason, in our judgment, why the inquest of a coroner ought to be admissible to prove, prima facie or otherwise, any issue in such case."

Spiegel's House Furnishing Co. v. Industrial Com., 123 N.E. (Ill.) 606; 6 ALR at pages 543, 546, 547,

also citing:

Reck v. Whittlesberger, 148 N.W. (Mich.) 247.

The California Court also held:

"An award based merely on hearsay evidence cannot be sustained."

Employers, etc. v. Industrial A.C., 151 P. 423.

The *Annotation on Workmen's Compensation LRA* 1916 (A), page 267, states:

"Nor, according to the weight of authority, can it" (the Board) "base an award on hearsay evidence only,"

citing the foregoing cases of:

Reck v. Whittlesberger, 148 N.W. 247;

Employers, etc. v. Industrial A.C., 151 P. 423.

The language of the New York Act providing that the Commission shall not be bound by common-law or statutory rules of evidence, or by technical rules of procedure, and may make its investigation in such a way as to ascertain the substantial rights of the

parties—which language is much broader than that of the Alaskan Act—has been held not to mean that the Commission may base an award upon hearsay evidence alone. While the New York Act allows the admission of hearsay evidence, there must be legal evidence in support of an award.

> *Carroll v. Knickerbocker Ice Co.,* 113 N.E. 507, which reversed the previous decision in that case in 155 N.Y. Supp. 1, L.R.A. 1916A, at page 268, note 9.

It will be noted that the Board's Award herein has no legal evidence whatever to support its Findings.

The Maryland statute, similar to that of New York, was construed similarly to the New York Act.

> "The first three exceptions were against the admission of the testimony of Mrs. Traylor and Mrs. Carey as to Traylor's statements when he was sick on his return from work, on occasions prior to the last that he had been gassed at the plant. In Standard Oil Co. v. Mealey, 147 Md. 252, 127 Atl. 851, it is said in the opinion delivered by Chief Judge Bond: 'Divergent views have been entertained in other jurisdictions on the relaxation by a Court of its ordinary rule for excluding hearsay evidence on review of compensation cases. . . . In New York, where the statutory provisions for the relaxation of rules of evidence before the Commission is the same as that in the Maryland Act, hearsay testimony is received in court reviews, but an award is not permitted to be based on such testimony alone. Carroll v. Knickerbocker Ice Co. 218 N.Y. 435, 113 N.E. 507, Ann. Cas. 1918B, 540; Belcher v.

Carthage Mach. Co. 224 N.Y. 326, 120 N.E. 735; State Treasurer v. West Side Trucking Co. 233 N.Y. 203, 135 N.Y. 244; Hansen v. Turner Constr. 224 N.Y. 331, 120 N.E. 693; And to the same effect are Kelley's case, 123 Me. 261, 122 Atl. 580; Royal v. Hawkeye Portland Cement Co. 195 Iowa, 534, 192 N.W. 406; Reck v. Whittlesberger, 181 Mich. 463, 148 N.W. 247, Ann. Cas. 1916C, 771, 5 N.C.C.A. 917; Garfield Smelting Co. v. Industrial Commission, 53 Utah 133, 178 Pac. 57; Rockfeller v. Industrial Commission, 58 Utah 124, 197 Pac. 1038; Valentine v. Weaver, 191 Ky. 37, 228 S.W. 1036; Riley v. Carnegie Steel Co. 276 Pa. 82, 119 Atl. 832,' * * *''

Bethlehem Steel Co. v. Traylor, 148 Atl. 246, 73 ALR 479, 483.

The Michigan Court held, to make the facts found by the Board conclusive, they must be based upon competent legal evidence, and not on bare supposition, guess, or conjecture, nor on rumor or incompetent evidence.

Reck v. Whittlesberger, 148 N.W. 247.

Such also is the rule laid down by American Jurisprudence, viz.:

"It is sometimes provided in compensation acts that the finding of the administrative tribunal as to certain facts or issues shall be final, or that findings of fact generally, in the absence of fraud, shall be conclusive. Such a provision is operative, however, only where the finding is supported by evidence."

58 *Am. Jur.,* 882, Sec. 483.

The Alaska Act on this topic reads:

> "An award by the full Board shall be conclusive and binding as to all questions of fact; but, either party to the dispute, within 30 days from the date of such award, if the award be not in accordance with law, may bring injunction proceedings, mandatory, or otherwise, against the Industrial Board, to suspend or set aside, in whole or in part, such order or award."
>
> Sec. 43-3-22, ACLA 1949.

Appellee Landro having adduced no evidence at the hearing to support the Board's findings, they are neither conclusive nor binding, and the lower Court should have set them aside.

The Illinois Court so held under similar language of its act.

> "If the coroner's verdict in this case is held to be competent evidence, it is as clear as any proposition can well be made that plaintiff in error is to be held liable upon the declarations of Cloyes, now deceased, made at a time when he was a real party in interest and in his own interest, and without the sanction of an Oath, and under circumstances that the declarations could not possibly be met or refuted by plaintiff in error by other evidence, or even by the right of cross-examination. This is so because the circuit court and this Court, under our Compensation Act, can only pass upon questions of law, and cannot reverse the order of the Industrial Commission for insufficiency of the evidence, unless we can say that there is no competent evidence in the record tending to support such order. It is equally clear

that there was no competent evidence before the coroner's jury or the Industrial Commission showing or tending to show that the injury to the deceased arose out of and in the course of his employment, unless we hold that the unsupported verdict of the coroner's jury, is competent evidence for such purpose. Plaintiff in error was not a party to the proceedings before the coroner's jury, was not present and had no right to be present or represented in that proceeding, had no choice or right of choice in the selection of the jury, did not cross-examine and had no right to cross-examine the witnesses before that jury, or to contradict the evidence tending to prove the liability against it which it is claimed the verdict of that jury now establishes. To hold that that verdict has that effect is to condemn plaintiff in error without a hearing, and to violate the most elementary and sacred rules for the administration of justice between private individuals, guaranteed by our laws and our Constitution, both state and national."

Spiegel's House Furnishing Co. v. Industrial Com., 123 N.E. 606, 6 ALR 543;

Libby, McNeill & Libby v. Board, 11 AR 327, 333.

This doctrine is also at least impliedly sustained in *Phillips v. Industrial Commission,* 61 NE 2d (Ill.) 681, 172 ALR 372, 377.

Appellant contends that even Landro's incompetent evidence does not show his temporary total disability continued until May 20, 1949, and that, in any event, the Board's finding is not conclusive upon this or the

lower Court unless it is based upon the weight of competent evidence.

(B) AWARD SHOULD HAVE BEEN BASED ON DR. GRAY'S COMPETENT EVIDENCE.

Inasmuch as Dr. Gray's testimony was competent evidence, adduced according to legal rules for the admission of evidence, and relevant to the subject, without its credibility being attacked in any manner, it is binding and conclusive not only upon the Board but also upon the lower Court, and, inasmuch as he testified that in his opinion Landro's temporary disability ended on October 1, 1948, by stating, "I also noted when I examined him on September 30, 1948, that I felt that he had made satisfactory progress, that he was fit to work, and that his temporary disability would be terminated on October 1, 1948" (R. 21-22), in the absence of any competent evidence to the contrary the Board should have found, in fact had no evidence upon which to base any finding other than that Landro's temporary total disability ended on October 1, 1948.

Under those condtions the Board's finding that Landro's temporary total disability continued to May 20, 1949, (R. 34) and he was entitled to temporary total disability compensation until May 20, 1949, was neither conclusive nor binding upon the lower Court.

To the contrary, the lower Court should have modified that finding and based its opinion upon the only

competent evidence, namely, that of Dr. Gray, and held that Landro's temporary disability ended October 1, 1948, and that he was entitled to no further total temporary disability compensation because he had already admittedly been paid his total temporary disability compensation of $680.76 to September 30, 1948 (R. 39).

Appellant further contends that for like reasons the Board should have found, under the only competent evidence adduced before it, namely, by the deposition of Dr. Gray, that Landro had suffered 10% permanent disability (R. 18), and awarded him 10% permanent disability compensation therefor, but which Landro would not have been entitled to have been paid without first crediting thereon the temporary disability compensation already paid him of $680.76.

We do not further discuss this particular point because the Board made no finding upon it (Award 2nd paragraph, R. 34); hence, seemingly, inasmuch as no one can predict whether or not such further hearing ever will be held, appellant cannot make any complaint now of the unnecessary expense it will incur if any when such further hearing is held on this particular disability phase although it could properly have been decided upon Dr. Gray's competent evidence regarding it.

Appellant, however, submits that the lower Court had jurisdiction to have modified the Board's award in this respect.

ATTORNEY FEE NOT TAXABLE AS COSTS AGAINST UNSUCCESSFUL LITIGANT ON APPEAL TO DISTRICT COURT FOR REVIEW OF ALASKA INDUSTRIAL BOARD'S AWARD.

Question 2 (Point 6, R. 82).

The District Court in its judgment allowed as costs an attorney fee of $200.00 to appellee Landro (R. 75) for the services of his attorney in the proceedings before the District Court.

The error of this allowance is the subject of Appellant's "Statement of Points" 6. (R. 82).

Alaska has no statute under which an attorney fee can be allowed as an item of costs to the successful litigant, unless under the general statute providing:

> "Disbursements allowed to party entitled to costs. Party's right to witness' and attorney's fees. A party entitled to costs shall also be allowed for all necessary disbursements, * * *; * * * and a reasonable attorney's fee to be fixed by the Court."
>
> Sec. 55-11-55, ACLA 1949.

The words "and a reasonable attorney's fee to be fixed by the Court" were included in the statute by amendment in 1947.

Ch. 84, ASL 1947.

The same words were in Section 1, Ch. 38, ASL 1923, which were construed in this Court's decision.

Pond v. Goldstein, 41 F. (2d) 76, 5 AFR 544, 556;

Forno v. Coyle, 75 F. (2d) 692; 5 AFR 758, 766.

Appellant does not contend that Sec. 55-11-55, ACLA 1949, is invalid. It contends that that statute is not applicable to this proceeding which was an appeal for review by the District Court of a decision and award by the Alaska Industrial Board in favor of an injured employee under the Alaska Workmen's Compensation Act. (Full text, Appendix A).

This Court said, in discussing allowance of attorney's fee in a case where Ch. 58, ASL 1937, had amended Ch. 38, ASL 1923, by removing the words "and a reasonable attorney's fee to be fixed by the Court" two days before entry of judgment, viz.:

> "The assignment is well taken. The right to costs is purely statutory. No such right existed at common law. Day v. Woodworth, 13 How. 363, 372, 14 L. ed. 181. No party is entitled to costs until he prevails in the suit, in other words, until judgment is entered. Whatever the statute provides at that time is the measure of his allowable costs. As was said in Begbie v. Begbie, 128 Cal. 154, 155, 60 P. 667, 49 LRA 141:
>
> 'The right to recover costs exists solely by virtue of statutory provision. * * * and their recovery is governed by the statute in force at the time the right to have them taxed accrued.' "
>
> *Mutual, etc., Ass'n. v. Moyer,* 94 F. (2d) 906, 9 Alaska Reports 235, 240; cer. den. 304 US 581.

Section 10 of the Workmen's Compensation Act of Alaska provides:

> "Right to compensation exclusive. The right to compensation for an injury and the remedy

therefor granted by this Act shall be in lieu of all rights and remedies as to such injury now existing either at common law or otherwise, and *no rights or remedies, except those provided for by this Act, shall accrue to employees* entitled to compensation under this Act while it is in effect. * * *" (Emphasis supplied).

Appendix A, Page 22, Infra.

Section 17 of the Act further says:

"* * * In all proceedings before the Industrial Board or in any Court under this Act the costs shall be awarded and taxed as provided by law in ordinary civil actions in the District Court."

Appendix A, Page 32, Infra.

Appellant contends that this provision is solely procedural, providing only for the manner of awarding and taxing costs, and not a statutory authorization that attorney's fees may be taxed as costs.

Appellant contends that such conclusion is logically premised upon the subsequent language in Section 23 of the Act, and that such later language is a specific limitation upon and restriction of the quoted language from Section 17, if it can be construed as a grant of authority, namely:

"The fees of attorneys and physicians, and the charges of nurses and hospitals, for services under this Act shall be subject to the approval of the Industrial Board. When any claimant for compensation is represented by an attorney in the prosecution of his or her claim, the Industrial Board shall fix and state in the award, if compensation be awarded, the amount of the claim-

> ant's attorney's fees. The fee so fixed shall be binding upon both the claimant and his or her attorney, and *the employer shall pay to the attorney out of the award,* the fee so fixed, and the receipt of the attorney therefor shall fully acquit the employer for an equal portion of the award. * * *'' (Emphasis supplied).
>
> Appendix A, Page 39, Infra.

This language, appellant submits, distinctly shows that the legislature intended that the injured employee should not receive additional compensation by way of attorney's fees in any proceedings under the Act either before the Board or the District Court.

In this instance, it happens that the unsuccessful litigant is appellant who was the employer. But sauce for the goose should be sauce for the gander. It is entirely possible that an injured employee might be, in fact in instances he has been, the unsuccessful litigant on such an appeal. It scarcely seems possible that the Workmen's Compensation Act intended, should an injured employee appeal to the District Court from what he thought was an erroneous decision of the Board, that he might be charged with the fee of the employer's lawyer in that review or appeal proceedings should the District Court sustain the Board's decision.

Appellant concedes the dearth of authority on this question, which has not to its knowledge previously been presented to this Court, but it maintains that the provisions of Section 55-11-55, ACLA 1949, supra, are inapplicable in this proceedings in the absence

of specific authority for the application thereof by the Workmen's Compensation Act and in view of the latter's specific restriction of attorney fees to be paid out of the awarded compensation under Section 23 of the Act, (Page 41, Supra); hence, that the District Court was without jurisdiction in its judgment (R. 75) to adjudge that appellant should pay appellee Landro an attorney fee of $200.00.

Appellant submits that the lower Court's previous decision in

United Benefit Life Ins. Co. v. Elliott, et al.,
11 Alaska Reports 466, 476,

wherein it held that the plaintiff in an interpleader suit was not entitled to attorney fees as an allowable cost under then Section 4065, CLA 1933, which is now Sec. 55-11-55, ACLA 1949, supra, with the added amendments, spoken of in that decision, of Chapters 58, ASL 1937, and 84, ASL 1947, clearly show that it could not allow the $200.00, or any sum, for attorney fees as allowable costs in this suit because this proceedings is not within the purview of the classes of cases mentioned in Section 55-11-52, ACLA, 1949, formerly Section 4062, CLA 1933.

"Chapter 2, Title 56", mentioned in the 2nd subparagraph of Section 55-11-52, ACLA 1949, is "Actions by and against Public Corporations", Sections 56-2-1 to 56-2-4, ACLA 1949, Code of Civil Procedure, Volume 3, ACLA 1949, formerly Chapter CII, Sections 3816 to 3819, ACL 1933.

"Chapter 4, Title 56", mentioned in 2nd subparagraph of Section 55-11-52, ACLA 1949, is "Actions

to Avoid Charters and to Prevent the Usurpation of an office or franchise and to determine the right thereto," Sections 56-4-1 to 56-4-14, ACLA 1949, Code of Civil Procedure, Volume 3, ACLA 1949, formerly Chapter CIII, Sections 3824 to 3837, ACL 1933.

CONCLUSION.

For the foregoing reasons appellant urges that the judgment of the District Court and the decision and award of the Alaska Industrial Board should be reversed and modified to holding that appellee Landro's total temporary disability ended on October 1, 1948, for which he was entitled to be paid total temporary compensation of $680.76 only, which was paid to him prior to his making and filing his claim herein (R. 39); and, that the decision of the District Court should be reversed in allowing appellee Landro an attorney fee of $200.00, or any sum, as an allowable cost for the services of his attorney in the proceedings on the appeal before the District Court.

Dated, September 6, 1950.

Respectfully submitted,
R. E. ROBERTSON,
ROBERT W. HOLLAND,
BOGLE, BOGLE & GATES,
Attorneys for Appellant.

(Appendices A and B Follow.)

Appendices A and B.

Appendix A

Compilation of Workmen's Compensation Act of Alaska, Chapter 9, SLA 1946, entitled

"AN ACT. Relating to the measure and recovery of compensation of injured employees in all businesses, occupations, work, employments and industries in the Territory of Alaska, except domestic service, agriculture, dairying and the operation of railroads as common carriers, and relating to the compensation to designated beneficiaries where such injuries result in death, defining and regulating the liability of employers to their employees in connection with such businesses and industries; providing for a second injury fund; creating an Industrial Board, and defining its duties; making the Territorial Department of Labor the administrative agency to carry into effect the provision of this Act; providing for penalties, and repealing Section 2161 to Section 2203, inclusive, Compiled Laws of Alaska, 1933, as amended by Chapter 84, Session Laws of Alaska 1935, Chapter 74, Session Laws of Alaska 1937, Chapter 49, Session Laws of Alaska 1939, Chapter 44, Session Laws of Alaska 1941, and Chapter 63, Session Laws of Alaska 1937."

as amended by Chapter 45, SLA 1947, entitled

"AN ACT. Amending the Workmen's Compensation Act, Chapter 9, Session Laws of Alaska, 1946, to relieve minor surviving children in remote and isolated sections of the Territory from the consequences of failure to file a claim within the time prescribed by Section 29 of the Act.",

now compiled as Sections 43-3-1 to 43-3-39, ACLA 1949.

§43-3-1. **Employment covered: Compensation allowed: Death benefits: Total and permanent disability: Partial permanent disability: Disfigurement: Temporary disability: Loss of members: Amputations: Other permanent partial injuries: Payments to second injury fund: Fund beneficiaries: Refund of payments to fund: Injury causing permanent disability when combined with previous disability.** Any person, or persons, partnership, joint stock company, association or corporation, employing three or more employees in connection with any business, occupation, work, employment or industry, carried on in this Territory, including any department, agency or instrumentality of the Territorial Government, Municipality or Public Utility District, except domestic service, agriculture, dairying, or the operation of railroads as common carriers, shall be liable to pay compensation in accordance with the schedule herein adopted, to each of his, her, their or its employees who receives a personal injury arising out of and in the course of his or her employment or to the beneficiaries named herein, as the same are hereinafter designated and defined in all cases where the employee shall be so injured and such injuries shall result in his or her death.

(COMPENSATION ALLOWED.) The compensation to which such employee so injured, or, in case of his or her death, if death results from such injury,

such beneficiaries shall be entitled, and for which such employer shall be legally liable, shall be as follows:

(1) (AMOUNT OF DEATH BENEFITS.) In the event of the death of any such employee resulting from such injury, where such employee at the time of his death was married, his widow shall be entitled to receive the sum of Four Thousand Five Hundred Dollars ($4,500.00).

(2) (CHILDREN). In those cases where such married employees had a child or children under the age of eighteen (18) years at the time of his death, his widow shall be entitled to receive in addition to the sum above specified, the sum of Nine Hundred Dollars ($900.00) for each child under the age of eighteen (18) years, or child wholly dependent upon his or her parents for support by reason of mental or physical incompetency, or unborn or posthumous child, which such employee left at the time of his decease, but not to exceed in all the sum of Nine Thousand Dollars ($9,000.00).

(3) (DEPENDENT PARENTS.) In those cases where such employee left either father or mother or both, dependent upon him for support at the time of his death, the sum of Nine Hundred Dollars ($900.00) each shall be paid to such father or mother or both, in addition to the sum provided for and made payable to the widow. In no case, however, is the total sum to be paid hereunder to exceed the sum of Nine Thousand Dollars ($9,000.00) and the payments to which the widow and children may be entitled shall be first

paid out of said sum of Nine Thousand Dollars ($9,000.00).

(4) (NON-DEPENDENT PARENTS.) In those cases where such deceased employee was unmarried at the time of his or her death survived by either his or her father or mother, such father or mother shall be paid the sum of One Thousand Eight Hundred Dollars ($1,800.00); and, in addition thereto, the employer shall be required to pay the funeral expenses not to exceed the sum of One Hundred Ninety-five Dollars ($195.00) and such other expenses, if any, arising after the injury and before the death not to exceed One Hundred Ninety-five Dollars ($195.00).

(5) (NON-DEPENDENT PARENTS.) Where such deceased employee was unmarried and was survived by his or her father and mother, such father and mother shall be paid the sum of One Thousand Eight Hundred Dollars ($1,800.00) each; and, in addition thereto, the employer shall be required to pay the funeral expenses not to exceed the sum of One Hundred Ninety-five Dollars ($195.00) and such other expenses, if any, arising after the injury and before his death not to exceed One Hundred Ninety-five Dollars ($195.00).

(6) (WIDOWER WITH DEPENDENT MINORS: GUARDIAN.) In those cases where such deceased employee was a widower at the time of his death, but left one or more minor orphan children or child wholly dependent upon the deceased for support

by reason of mental or physical incompetency, there shall be paid the sum of Four Thousand Five Hundred Dollars ($4,500.00), and the further sum of Nine Hundred Dollars ($900.00) for each orphan child under the age of eighteen (18) years provided the total amount paid shall not exceed Nine Thousand Dollars ($9,000.00), and the judge of the Probate Court of the precinct wherein such accident or injury occurred, shall appoint a guardian for all of said children, who shall be entitled to, and who shall be paid, the amount specified in this paragraph, for the benefit of said orphan children, and shall divide Four Thousand Five Hundred Dollars ($4,500.00) thereof equally among such children and divide the surplus, if any, among the children under eighteen (18) years of age.

(7) (AMOUNTS PAID NON-RESIDENT NON-CITIZEN BENEFICIARIES.) Provided, however, that if such beneficiary or beneficiaries as described in subdivisions 1 to 6, inclusive, immediately preceding this subsection be neither resident or a citizen of the United States of America, then the amount due and payable to such beneficiary or beneficiaries shall be in amounts as follows:

(a) As to all beneficiaries, except a wife or minor children, fifty per centum (50%) of the sum set forth in subdivisions 1 to 6, immediately preceding, and fifty per centum (50%) shall be paid to the second injury fund, for the sole benefit of those entitled to participate therein, as hereinafter provided.

(b) As to a wife or minor children, sixty per centum (60%) of the sums set forth in subdivisions 1 to 6 immediately preceding, and forty per centum (40%) of the second injury fund, for the sole benefit of those entitled to participate therein, as hereinafter provided.

(8) (FUNERAL EXPENSES: PAYMENT TO SECOND INJURY FUND). In those cases where such deceased employee was, at the time of his or her death unmarried, and leaves no children nor father nor mother, the employer shall be required to pay the funeral expenses of the deceased not to exceed the sum of One Hundred Ninety-five Dollars ($195.00), and such other expenses, if any, arising after the injury and before the death, not to exceed the further sum of One Hundred Ninety-five Dollars ($195.00), and in addition thereto shall pay to the second injury fund the sum of One Thousand Five Hundred Dollars ($1,500.00), for the sole benefit of those entitled to participate therein as hereinafter provided.

(SECOND INJURY FUND.) There is hereby created a Second Injury Fund, to be administered by the Commissioner of Labor in accordance with the orders and awards of the Alaska Industrial Board.

(TOTAL AND PERMANENT DISABILITY.) Where any such employee receiving an injury arising out of, and in the course of his or her employment, as the result of which he or she is totally or permanently disabled, he or she shall be entitled to receive compensation as follows:

(a) (MARRIED PERSON.) If such employee was at the time of his injury married he shall be entitled to receive Seven Thousand Two Hundred Dollars ($7,200.00) with Nine Hundred Dollars ($900.00) additional for each child under the age of eighteen (18) years, but the total to be paid shall not exceed Nine Thousand Dollars ($9,000.00).

(b) (FATHER AND MOTHER.) If such employee at the time of his injury had no wife or children, but has a mother or father, Six Thousand Three Hundred Dollars ($6,300.00).

(c) (FATHER AND MOTHER.) In cases, where such employee who at the time of his injury had both father and mother, Six Thousand Five Hundred Dollars ($6,500.00).

(d) (MINOR CHILDREN). In those cases, where such employee was at the time of his injury, a widower, or was divorced, but had minor children, he shall receive the sum of Six Thousand Dollars ($6,000.00), with an additional sum of Nine Hundred Dollars ($900.00) for each child below the age of eighteen (18) years, provided that the total sum to be paid such employee shall not in any case exceed the sum of Nine Thousand Dollars ($9,000.00).

(e) (NO DEPENDENTS.) In those cases where such employee so injured at the time of his injury was unmarried and had no children nor father nor mother, he shall receive the sum of Six Thousand Dollars ($6,000.00).

(PARTIAL PERMANENT DISABILITY.) Where any such employee receives an injury arising out of, and in the course of his or her employment, resulting in his or her partial permanent disability, he or she shall be paid in accordance with the following schedule:

For the loss of a Thumb:

1 (a) In case the employee was at the time of the injury unmarried, $720.00.

1 (b) In case the employee was married but had no children, $900.00.

1 (c) In case the employee was either married or a widower, but had one or more children, $1,080.00.

For the loss of an Index Finger:

2 (a) In case the employee was at the time of the injury unmarried, $450.00.

2 (b) In case the employee was married but had no children, $585.00.

2 (c) In case the employee was either married or a widower, but had one or more children, $720.00.

For the loss of any other finger than the Index Finger and Thumb, $270.00.

For the loss of a Great Toe, $450.00.

For the loss of any other Toe other than the Great Toe, $180.00.

For the loss of a Hand:

3 (3) In case the employee was at the time of the injury unmarried, $2,160.00.

3 (b) In case the employee was married but had no children, $2,880.00.

3 (c) In case the employer was either married, or a widower and had one child, $2,880.00 and $360.00 additional for each additional child, not to exceed, however, the total sum of $3,600.00.

For the loss of an Arm:

4 (a) In case the employee was at the time of the injury unmarried, $2,700.00.

4 (b) In case the employee was married but had no children, $3,600.00.

4 (c) In case the employee was either married, or a widower and had one child, $3,600.00 and $450.00 additional for each such additional child, the total amount not to exceed, however, $4,500.00.

For the loss of a Foot:

5 (a) In case the employee was at the time of the injury unmarried, $2,160.00.

5 (b) In case the employee was married but had no children, $2,700.00.

5 (c) In case the employee was either married, or a widower and had one child, $2,880.00 and $360.00 additional for each additional child, but not to exceed the total sum of $3,600.00.

For the loss of a Leg:

6 (a) In case the employee was at the time of the injury unmarried, $2,700.00.

6 (b) In case the employee was married but had no children, $3,600.00.

6 (c) In case the employee was either married, or a widower and had but one child, $3,600.00 with $450.00 for each such additional child, not to exceed the total sum of $4,500.00.

For the loss of an Eye:

7 (a) In case the employee was at the time of the injury unmarried, $2,160.00.

7 (b) In case the employee was married but had no children, $2,880.00.

7 (c) In case the employee was either married, or a widower and had one child, $2,880.00 plus $360.00 for each additional child, not to exceed, however, the total sum of $3,600.00.

For the loss of an Ear: $360.00.

For the loss of hearing in one Ear: $720.00.

For the loss of the Nose: $720.00.

Compensation for permanent total loss of use of a member shall be the same as for the loss of such member.

(DISFIGUREMENT.) The Industrial Board may award proper and equitable compensation for serious head, neck, facial, or other disfigurement, not exceeding, however, the sum of Two Thousand Dollars ($2,000.00).

(TEMPORARY DISABILITY.) For all injuries causing temporary disability, the employer shall pay

the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule.

Payment for such temporary disability shall be made at the time compensation is customarily paid for labor performed or services rendered at the plant or establishment of the employer liable therefor and not less than once a month in any event.

The average daily wage earning capacity of an injured employee in case of temporary disability shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his daily wage earning capacity. If such earnings do not fairly and reasonably represent his daily wage earning capacity, the Industrial Board shall fix such daily wage earning capacity as shall be reasonable and have a due regard for the nature of his injury, the degree of temporary impairment, his usual employment and any other factor or circumstance in the case which may affect his capacity to earn wages in his temporary disabled condition.

(LOSS OF MEMBERS AS TOTAL PERMANENT DISABILITY.) The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or

any two thereof, or hearing in both ears, shall constitute total and permanent disability and be compensated according to the provisions of this Act with reference to total and permanent disability.

(AMPUTATIONS.) Amputation between the elbow and the wrist shall be considered equivalent to the loss of an arm, and amputation between the knee and ankle shall be considered equivalent to the loss of a leg.

(OTHER PERMANENT PARTIAL INJURIES.) Whenever such employee receives an injury, arising out of and in the course of employment, as a result of which he or she is partially disabled, and the disability so received is such as to be permanent in character and such as not to come wholly within any of the specific cases for which provision is herein made, such employee shall be entitled to receive as compensation a sum which bears the same relation to the amount he or she would be entitled to receive hereunder if he or she were totally and permanently disabled that the loss of earning capacity such employee by reason of the injury, bears to the earning capacity such employee would have had had he or she not been injured, the amount to be paid in no case to exceed Seven Thousand Two Hundred Dollars ($7,200.00).

To illustrate: If said employee were of a class that would entitle him or her to Seven Thousand Two Hundred Dollars ($7,200.00) under this schedule, if he or she were totally and permanently disabled, and his or her injury would be such as to reduce his or her

earning capacity twenty-five per centum (25%), he or she would be entitled to receive One Thousand Eight Hundred Dollars ($1,800.00), it being the amount that bears the same relation to Seven Thousand Two Hundred Dollars ($7,200.00) that twenty-five per centum (25%) does to one hundred per centum (100%). Should such employee receive an injury that would impair his or her earning capacity seventy-five per centum (75%), he or she would be entitled to receive Five Thousand Four Hundred Dollars ($5,400.00), it being the amount that bears the same relation to Seven Thousand Two Hundred Dollars ($7,200.00) that seventy-five per centum (75%) does to one hundred per centum (100%).

(9) (PAYMENTS TO SECOND INJURY FUND.) Whenever an employee shall suffer a compensable injury which results in permanent partial disability by reason of the total or partial loss or loss of use of a member or members, as provided in Paragraph (8) hereof, and which injury entitled him or her to compensate pursuant to such Paragraph (8), the employer, or his insurance carrier, shall, in addition to the compensation provided for in said Paragraph (8), pay into the second injury fund a lump sum, without interest deductions, equal to two per centum (2%) of the total compensation to which the employee is entitled under said Paragraph (8) of this section for the said permanent partial disability, the said sum to be paid into such second injury fund as soon as the total amount of the permanent partial dis-

ability payable for the particular injury is determined by the Industrial Board.

(10) (SECOND INJURY FUND BENEFICIARIES.) The sums required to be paid into the second injury fund under the provisions of Paragraph (7), (8) and (9) of this section shall be paid into said second injury fund of the Commissioner of Labor for the sole benefit of those entitled to participate therein under the provisions of Paragraph (12) of this section, the same to be paid out by said Commissioner of Labor in accordance with the orders and awards of the Industrial Board.

(11) (REFUND OF PAYMENTS TO SECOND INJURY FUND.) In case a deposit or payment has been made into such second injury fund, as provided in Paragraph (7) of this section, and it is later shown that there are other beneficiaries or that the beneficiaries designated are entitled to further or greater benefits, or, as provided in Paragraph (8) of this Section, and it is later shown that there are beneficiaries entitled to compensation, or, if deposits or payment has been made pursuant to Paragraph (9) hereof by mistake or inadvertence or under such circumstances that justice requires a refund thereof, the Industrial Board is hereby authorized to refund such deposit or payment.

(12) (INJURY CAUSING TOTAL PERMANENT DISABILITY WHEN COMBINED WITH PREVIOUS DISABILITY.) In those cases where an employee receives an injury arising out of and in

the course of his or her employment which, of itself, would cause only permanent partial disability but which, combined with a previous disability or injury, does in fact cause permanent total disability, the employer shall only be liable for the permanent partial disability caused by the subsequent injury; provided, however, that in addition to compensation for such permanent partial disability and after the cessation of the payments for the amounts prescribed therefor, the injured employee shall be paid the remainder of the compensation that would be due for permanent total disability out of the second injury found hereinbefore created and provided.

§ 43-3-2. Treatment and care of injured employees: Duty and liability of employer: Duration: Prevailing fees: Selection of physicians, surgeons and hospitals: Aggravation of injuries by incompetence or neglect of physician: Liability: Right of employee to provide physician. The employer shall promptly provide for an injured employee such medical, surgical or other attendance or treatment, nurse and hospital service, medicine, crutches and apparatus for such period as the nature of the injury or the process of recovery may require, not exceeding one year from and after the date of injury to any such employee. The employer shall be liable for the payment of the expenses of medical, surgical or other attendance or treatment, nurse, and hospital service, medicine, crutches, and apparatus necessitated by the injury of an employee, for such period as the nature of the injury or the process of recovery may require, not exceeding one

year from and after the date of injury to any such employee. All fees and other charges for such treatment and services shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living. The employer shall have the exclusive right, and it shall be his duty to select and furnish the necessary physicians, surgeons and hospitals and to that end he may enter into all necessary contracts with such physicians, surgeons and hospitals for the furnishing of such services and treatments. Provided, that if it be made to appear in any suit, action or proceeding brought against the employer that the injuries sustained by the employee were aggravated on account of the incompetence or neglect of the physician or surgeon selected by the employer, it shall be prima facie evidence that the employer failed to use due care in the selection of such physician or surgeon and in such case the employer and physician or surgeon shall be jointly and separately liable for all damages resulting from such incompetence or neglect. Nothing contained in this section shall be construed to limit the right of the employee, to provide in any case, at his own expense, a consulting physician or any attending physician whom he may desire.

§ 43-3-3. Time and manner of paying compensation: Interest: Failure to pay compensation: Penalty. All compensation allowed hereunder for temporary disability shall be paid periodically and promptly in like manner as wages, and as it accrues, and directly to the person entitled thereto, without waiting for an

award by the Industrial Board, and shall bear interest from and after the period of thirty days after the date of the injury by which the claim for compensation arose at the rate of eight per centum (8%) per annum until paid. If the employer or insurance carrier shall fail to pay any installment of compensation within twenty days after the same becomes due, there shall be paid by the employer, or his insurance carrier, an additional sum equal to ten per centum (10%) of the compensation then due, unless such delay or default is excused by the Industrial Board, on the application of the employer or insurance carrier and upon the ground that owing to conditions over which the employer or insurance carrier had no control, such payment could not be made.

In all other cases, compensation shall be paid biweekly, monthly, or otherwise, as the Industrial Board may determine to be for the best interest of the injured employee or his or her beneficiaries; and such payments shall bear interest from and after the period of thirty days after the date of the order or award. If the employer or insurance carrier shall fail to pay compensation according to the terms of such order or award within twenty days thereafter, except in the case of an appeal, there shall be paid by the employer, or his insurance carrier, an additional sum equal to twenty per centum (20%) of the compensation due.

§ 43-3-4. Modification of compensation: Continuing jurisdiction: Effect of review upon moneys already paid: Limitation of time. If an injured employee (is)

entitled to compensation under any subdivision or part of this schedule, and it shall afterwards develop that he or she is or was entitled to a higher rate of compensation under same or some other part or subdivision of this schedule, then and in that event he or she shall receive such higher rate, after first deducting the amount that has already been paid him or her. To that end the Industrial Board is hereby given and granted continuing jurisdiction of every claim, and said Board may, at any time and upon its own motion or on application, review any agreement, award, decision or order, and on such review, may make an order or award ending, diminishing or increasing the compensation previously awarded, ordered, or agreed to, subject to the maximum or minimum provided in this Act. No such review shall affect such award, order or settlement as regards any moneys already paid, except that an award or order increasing the compensation rate may be made effective from a date of injury, and except that if any part of the compensation due or to become due is unpaid an award or order decreasing the compensation rate may be made effective from the date of injury, and any payments made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such methods as may be determined by the Industrial Board; provided, however, that no compensation under such increased rate shall be paid unless the disability entitling the employee thereto shall develop and claim be presented within three (3) years after the injury.

§ 43-3-5. Lien to secure compensation: Extent: Priority and rank: Notice of lien: Filing and contents: Enforcement: Attachment. Every employee and every beneficiary entitled to compensation under the provisions of this Act shall have a lien for the full amount of such compensation, including costs and disbursements of suit and attorneys' fees therein allowed or fixed, upon all of the property in connection with the construction, preservation, maintenance or operation of which the work of such injured or deceased employee was being performed at the time of the injury or death of such employee. For example: In the case of an employee injured or killed while engaged in mining or in any work connected with mining, the lien shall extend to the entire mine and all property used in connection therewith; and in the case of an employee injured or killed while engaged in fishing or in the packing, canning or salting of fish, or other branch of the fish industry, the lien shall extend to the entire packing, fishing, salting or canning plant or establishment and all property used in connection therewith; and the same shall be the case with all other businesses, industries, works, occupations and employments. The lien herein provided for shall be prior and paramount and superior to any other lien of the property affected thereby, except liens for wages or materials as is now or may hereafter be provided by law, and shall be of equal rank with all such liens for wages or materials. The lien hereby provided for shall extend to and cover all right, title, interest and claim of the employer of, in and to the property affected by

such lien. Any person claiming a lien under this Act shall, within four months after the date of the injury from which the claim of compensation arises, file for record in the office of the recorder of the precinct in which the property affected by such lien is situated a notice of lien signed and verified by the claimant or some one on his or her behalf, and stating substance, the name of the person injured or killed out of which injury or death the claim of compensation arises, the name of the employer of such injured or deceased person at the time of such injury or death, a description of the property affected or covered by the lien so claimed, and the name of the owner or reputed owner of such property.

The lien for compensation herein provided may be enforced by a suit in equity as in the case of the enforcement of other liens upon real or personal property, at any time within ten months after the cause of action shall arise. Nothing in this Section contained shall be deemed to prevent an attachment of property as security for the payment of any compensation as in this Act provided.

§43-3-6. Compromise: Filing memorandum: Approval by Board: Effect: When agreement to be approved. At any time after death, or after seven days subsequent to the date of the injury, the employer and the employee or the beneficiary or beneficiaries, as the case may be, shall have the right to reach an agreement in regard to any claim for injury or death hereunder in accordance with the schedule hereof, but

a memorandum of the agreement, in a form prescribed by the Industrial Board shall be filed with the Board, otherwise the same shall be void for any purpose. If approved by the Board, such agreement shall be enforceable the same as any order or award of the Board, and subject only to modification in accordance with the provisions of Section 4 hereof (§ 43-3-4 herein). Such agreement shall be approved by the Board only when the terms conform to the provisions of this Act, and, if it involves or is likely to involve permanent disability, only after an impartial examination and an opportunity to be heard.

§43-3-7. Injuries not covered. No compensation shall be allowed or paid for the injury or death of an employee in any case where such injury or death was occasioned by his or her wilful intention to bring about the injury or death of himself or herself or of another, or where the employee's intoxication was the proximate cause of injury.

§ 43-3-8. When right to compensation accrues: Period of incapacity: Report to employer: Compensation not to be paid prior to report. No compensation shall be paid hereunder for any injury which does not incapacitate the employee from earning full wages for a period of at least one day in addition to the day on which the injury occurred, but if incapacity extends beyond such period compensation shall commence on the second day after the injury. It shall be the duty of every person claiming compensation under the provisions of this Act for any injury sustained by him to make or cause to be made, a report thereof to his em-

ployer as soon as practicable after sustaining the same, and no compensation shall be paid prior to the day on which such report is made.

§43-3-9. Presumption of employment: "Independent contractors" defined. Any person rendering service for another, other than as an independent contractor, or as expressly excluded herein, is presumed to be an employee within the meaning of this Act. The term "independent contractor" shall be taken to mean, for the purpose of this Act, any person who renders service, other than manual labor, for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished.

§43-3-10. Right to compensation exclusive: Failure to secure insurance: Election of remedies: Pleading or proof of contributory negligence unnecessary: Defenses barred. The right to compensation for an injury and the remedy therefor granted by this Act shall be in lieu of all rights and remedies as to such injury now existing either at common law or otherwise, and no rights or remedies, except those provided for by this Act, shall accrue to employees entitled to compensation under this Act while it is in effect; nor shall any right or remedy, except those provided for by this Act accrue to the person or legal representative, dependents, beneficiaries under this Act, or next of kin of such employee; provided, however, that if an employer fails to secure the payment of compensation as required by this Act, by insuring with an authorized insurance carrier or by meeting the requirements for

self-insurance, then any injured employee, or, in case of death, his or her beneficiaries, may, at his, her or their option, elect to claim compensation under this Act or to maintain an action in the courts for damages on account of such injury or death; and, in the event of his, her or their election to bring such action it shall not be necessary to plead or prove freedom from contributory negligence, nor may the defendant employer plead or prove as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due, in whole or in part, to the contributory negligence of the employee.

§ 43-3-11. Step-parents, adopted children, and step-children: How regarded. Step-parents shall be regarded in this Act as parents, and an adopted child, or adopted children, or a step-child or children, shall be regarded in this Act as issue of the body.

§ 43-2-12. Statement of beneficiaries by employee: Change in beneficiaries or address: Notice to beneficiaries: Form: Failure to list or notify beneficiaries: Employee's statement as evidence: Service of notice of claim.

(a) (STATEMENT OF BENEFICIARIES BY EMPLOYEE.) Every employer coming within the provisions of this Act shall require of every employee who shall execute the same, either at the time he or she is employed or thereafter, a written statement showing the name or names of each and all persons that would be entitled to benefits under the provisions of this Act in case such employee should become deceased

as a result of any injury received by him, or her, arising out of and in the course of his or her employment, such written statement shall bear the date upon which the same shall be furnished to the employer, and shall be signed by the employee. Provided, that, in cases where such employee is unable to write his or her name, his or her name may be affixed to such statement by another, and such employee shall make his or her mark in the manner customary in such cases and such mark shall be made in the presence of at least one witness, who shall subscribe such statement as a witness. In all cases the employee shall be furnished a duplicate of the said statement.

(b) (CHANGE IN BENEFICIARIES OR ADDRESS THEREOF.) In all cases where there shall be a change of beneficiaries, or a change in the address of any beneficiary, the employee may furnish the employer with a new statement showing such change, such new statement to be so furnished shall in all respects conform and comply with the provisions hereof with reference to the original statement to be furnished.

(c) (NOTICE TO BENEFICIARIES.) In all cases where such statement, or statements, is, or are, furnished the employer by the employee, the employer shall, if such employee becomes deceased as a result of an injury received in the course of his or her employment, notify each beneficiary named in the last statement of the fact; such notice shall be given by sending each beneficiary at the address given in the last statement furnished a copy of such notice by

registered mail, and an envelope containing such notice addressed to each beneficiary at the address given in said last statement furnished, shall be deposited in the post office and registered, within ten days after such employee shall have become deceased.

(d) (NOTIFICATION FORM.) The notice to be given shall be substantially in the following form:

To ..... (giving the name of the beneficiary).

This is to advise you that..... (giving the name of the deceased person) became deceased on the ..... day of..... as a result of an injury received while in the employ of..... You will take notice that all persons entitled to benefits because of the fact that the above named employee was injured and as a result thereof became deceased, under the laws of Alaska, are required to serve notice upon the employee with one hundred and twenty (120) days after the date on which such employee became deceased, in accordance with the provisions of the laws of Alaska upon that subject, and that failure to serve such notice within the time specified and in the manner specified will result in depriving the beneficiary, failing to give such notice within such time and in such manner, of his or her rights to compensation under the laws of Alaska.

(e) (FAILURE OF EMPLOYEE TO LIST BENEFICIARIES.) Any failure on the part of the employee to supply the employer with a statement as hereinabove provided shall not work a forfeiture of

the right of his or her beneficiaries to benefits hereunder.

(f) (FAILURE OF EMPLOYER TO NOTIFY BENEFICIARIES.) In cases where the employer shall have been furnished with such statements and shall fail to notify the beneficiaries therein named as shown by the last statement furnished, within the time and manner herein provided, such beneficiaries who have not been so notified shall have the right to notify the employer of their claims to benefits and file claims and prosecute actions or other proceedings for the recovery thereof, notwithstanding the fact that such notice was not served as hereinafter provided within the period of one hundred and twenty (120) days from and after the time the employee became deceased.

(g) (EMPLOYEE'S STATEMENT AS EVIDENCE.) Upon the trial of any issue relating to a beneficiary's right to compensation under this Act, any written statement furnished an employer, as hereinabove provided, may be offered in evidence and shall be prima facie but not conclusive evidence that there are no other beneficiaries.

(h) (NOTICE OF BENEFICIARY'S CLAIM: SERVICE.) In all cases where any person claims to be a beneficiary under this Act entitled to compensation because of an injury to an employee coming within its provisions, which resulted in such employee's death, someone in his or her behalf shall within one hundred and twenty (120) days from and after the death of such employee serve a written notice upon

the employer, which notice shall contain the name and address of the person claiming to be such beneficiary, the relationship existing between such beneficiary and the deceased, and if such beneficiary shall be either the father or mother of the deceased, such notice shall also contain a statement showing that such persons were dependent upon the earnings of the deceased. Such notice shall be liberally construed and no claim for compensation shall be denied because of any defect in the notice, provided it appears that a notice was served with a bona fide intention to comply with the provisions of this Act. Such notice may be served by any person of legal age by delivering a copy thereof to the employer or the employer's agent in person or by leaving a copy thereof at the employer's principal place of business within the Territory of Alaska with some person over the age of eighteen (18) years in the employ of such employer, or by mailing the same by registered mail, addressed to said employer at his last known business address. If the employer cannot be found within the Territory and has no known agent or place of business therein, such beneficiary may serve such notice by registered mail upon the Industrial Board, and it shall be the duty of such Industrial Board to publish the same in one issue of any newspaper of general circulation published in the Judicial Division where the injury, out of which the right to compensation arose, occurred. Failure to give such notice shall not bar any claim (1) if the employer or his agent in charge of the business at the place where the injury occurred, or the insurer, had knowledge of

the injury or death and the Industrial Board determines that the employer or insurer has not been prejudiced by the failure to give such notice; or (2) if the Industrial Board finds that there was good cause for not giving such notice; Provided that no objection based on such failure shall be considered unless made at the first hearing of the claim before the Board. In case of doubt as to the proper beneficiaries, the employer shall submit the matter to the determination of the Industrial Board.

§43-3-13. Notice in non-fatal cases: No compensation until notice or knowledge: Defective notice: Prejudice: Contents of notice: Signature and service. In all cases of injury not resulting in death, unless the employer or his agent shall have actual knowledge of the occurrence of the injury at the time thereof, or shall acquire such knowledge afterward, the injured employee, or someone in his or her behalf, as soon as practicable after the injury, shall give written notice to the employer of such injury, such notice may be given in the manner provided in paragraph (h) of Section 12 (§ 43-3-12 herein).

Unless such notice is given or knowledge acquired within sixty days from the date of the injury, no compensation shall be paid until and from the date such notice is given or knowledge obtained, but no lack of knowledge by the employer or his agent and no want, failure, defect or inaccuracy of the notice shall bar compensation, unless the employer was prejudiced thereby, and then only to the extent of such prejudice.

The notice provided for in this Section shall state the name and address of the employee, the time, place, nature and cause of the injury, and shall be signed by the employee, as provided in paragraph (a) of Section 12 (§ 43-3-12 herein), or by some one in his or her behalf, and served as provided in paragraph (h) of Section 12 (§ 43-3-12 herein).

§ 43-3-14. Rules: Process and procedure to be summary and simple: Powers of board: Subpoenas: Service and fee: Fees and mileage of witnesses. The Industrial Board may make rules not inconsistent with this Act for carrying out the provisions hereof. Process and procedure under this Act shall be as summary and simple as reasonably may be. The Board or any member thereof shall have the power for the purpose of this Act to subpoena witnesses, administer or cause to have administered oaths, and to examine or cause to have examined such parts of the books and records of the parties to a proceeding as relate to questions in dispute.

Subpoenas of the Board shall be served by the marshal, or any deputy marshal, or by a person specially appointed by the marshal. The fees shall be the same as fees now provided by law for like service in civil actions. Each witness who appears in obedience to such subpoena of the Industrial Board shall receive for attendance the fees and mileage for witnesses in civil cases in the courts.

The District Court, on application of the Industrial Board or any member thereof, shall enforce, by proper

proceedings, the attendance and testimony of witnesses and the production and examination of books, papers and records.

§ 43-3-15. Procedure in disputed claims: Application for hearing: Fixing time and place of hearing: Where hearing to be held: Determination: Filing award: Copies to parties. If the employer and the injured employee, or his or her beneficiaries, disagree in regard to the compensation payable under this Act, or if they have reached such an agreement, which has been signed by him, her or them and has been filed with and approved by the Industrial Board as provided in Section 6 (§ 43-3-6 herein), and afterwards disagree as to the continuance of payments under such approved agreement, or as to the period for which payments shall be made, or as to the amount to be paid, or if a dispute arises for any other reason, either party may then make application to the Industrial Board for the determination of the matters in dispute.

Upon the filing of such application, the Board shall set the date of hearing, which shall be as early as practicable, and shall notify the parties, in the manner prescribed by the Board, of the time and place of such hearing. Such hearings shall be held in the district in which such injury occurred, unless, for the convenience of witnesses or other good cause, the Board determines that such hearing should be held elsewhere.

All disputes arising under this Act, if not settled by agreement as in this Act provided, shall be determined

by the Board; and nothing in this Section contained shall be construed to affect the continuing jurisdiction of the Board as provided in Section 4 (§ 43-3-4 herein) nor to prevent such Board from making any investigation on its own motion.

The Industrial Board, by any or all of its members, shall hear the parties, their representatives and witnesses, and shall determine the dispute in a summary manner. The award shall be filed with the record of the proceedings, and a copy thereof shall immediately be sent to each of the parties.

§ 43-3-16. Review by full Board: Application: Time for: Award: Filing: Copies. If an application for review is made to the Industrial Board within ten days from the date of an award, made by less than all the members, the full Board, if the first hearing was not held before the full Board, shall review the evidence, or, if deemed advisable, hear the parties at issue and their representatives and witnesses as soon as practicable, and shall make an award and file the same with the findings of fact on which it is based, and shall send a copy thereof to each of the parties forthwith.

§ 43-3-17. Judgment on agreement or award: Effect: Modification: Costs. Any party in interest may file in the District Court for the division in which the employer resides or has his place of business, a certified copy of the memorandum of agreement approved by the Board, or of an order or decision of the Board, or of an award of the full Board unappealed from, or of an award of the full Board affirmed upon an appeal, whereupon said court shall render judgment in

accordance therewith and notify the parties. Such judgment shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though said judgment had been rendered in a suit duly heard and determined by said court.

Any such judgment of said District Court unappealed from or affirmed on appeal or modified in obedience to the mandate of the Appellate Court, shall be modified to conform to any decision of the Industrial Board, ending, diminishing or increasing any payment under the provisions of Section 4 of this Act (§ 43-3-4 herein), upon the presentation to it of a certified copy of such decision.

In all proceedings before the Industrial Board or in any court under this Act the costs shall be awarded and taxed as provided by law in ordinary civil actions in the District Court.

§43-3-18. Insurance or proof of financial ability: Deposit of security. Every employer under this Act, except those exempted by Section 1 (§ 43-3-1 herein), shall either insure and keep insured his liability hereunder in some insurance company or association duly authorized to transact business of Workmen's Compensation Insurance in the Territory, or shall furnish to the Industrial Board satisfactory proof of his financial ability to pay direct the compensation provided for in this Act. In the latter case the Board may, in its discretion, require the deposit of an acceptable security, indemnity or bond to secure the payment of compensation liabilities as they are incurred.

§ 43-3-19. Filing evidence of compliance: Exception: Failure to comply. Every employer under this Act, except those exempted therefrom by Section 1 (§ 43-3-1 herein), shall, within ten days after this Act takes effect, file with the Industrial Board, in the form prescribed by it, and thereafter within ten days after the termination of his insurance by expiration or cancellation, evidence of his compliance with the insurance provisions of Section 18 (§ 43-3-18 herein) and all others relating to insurance under this Act; provided, that this requirement shall not apply to employers who have procured from the Industrial Board certificates of their financial ability to pay compensation directly without insurance.

Any employer hereafter coming under the compensation provisions of this Act shall, in like manner, file like evidence of such compliance.

If such employer fails, refuses, or neglects to comply with the provisions of this Section, he shall be subject to the penalties provided in Section 24 (§ 43-3-24 herein) for failure to report accidents; but nothing herein contained shall be construed as affecting the rights conferred upon injured employees or their beneficiaries under Section 10.

§ 43-3-20. Self-insurance certificates: Revocation: New certificate. Whenever an employer has complied with the provisions of Section 18 (§ 43-3-18 herein) relating to self-insurance, the Industrial Board shall issue to such employer a certificate which shall remain in force for a period fixed by the Board, but the Board may, upon at least ten days' notice and a hear-

ing, revoke the certificate of such employer upon satisfactory proof that such employer is no longer entitled thereto.

At any time after such revocation the Board may grant a new certificate to the employer, upon his petition and satisfactory proof of his financial ability as provided in Section 18 (§ 43-3-18 herein).

§43-3-21. Insurance policies: Approval by Insurance Commissioner: Presumption of coverage: Limitation of liability: Policy provisions.

(APPROVAL BY INSURANCE COMMISSIONER.) No insurer shall enter into or issue any policy of insurance under this Act until its policy form shall have been submitted to and approved by the Insurance Commissioner. The Insurance Commissioner shall not approve the policy form of any insurance company until such company shall file with it the certificate of the Commissioner of Insurance showing that such company is authorized to transact the business of Workmen's Compensation Insurance in the Territory. The filing of a policy form by any insurance company with the Industrial Board for approval shall constitute, on the part of such company, a conclusive and unqualified acceptance of each and all of the provisions of this Act, and an agreement by it to be bound thereby.

(PRESUMPTION OF COVERAGE.) All policies of insurance companies insuring the payment of compensation under this Act shall be conclusively presumed to cover all the employees and the entire com-

pensation liability of the insured employer employed at or in connection with the business of the employer carried on, maintained, or operated at the location or locations set forth in such policy or agreement.

(LIMITATION OF LIABILITY VOID.) Any provision in any such policy attempting to limit or modify the liability of the company issuing the same shall be wholly void except as provided in the preceding paragraph.

(REQUIRED POLICY PROVISION.) Every policy of any such company must contain the following provisions:

(a) (EXTENT OF COVERAGE.) The insurer hereby assumes in full all the obligations to pay physician's fees, nurse's charges, hospital services, hospital supplies, medicine, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, compensation or death benefits imposed upon the insured under the provisions of the Alaska Workmen's Compensation Law.

(b) (SUBJECTION TO ACT.) That the policy is made subject to the provisions of the Alaska Workmen's Compensation Law, and the provisions of said Act relative to the liability of the insured employer to pay physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, compensation or death benefits to and for said em-

ployees or beneficiaries, the acceptance of such liability by the insured employer, the adjustment, trial and adjudication of claims for such physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, compensation or death benefits and the liability of the insurer to pay the same are and shall be a part of this policy contract as fully and completely as if written herein.

(c) (NOTICE TO EMPLOYER.) That, as between the insurer and the employee or his or her beneficiaries, notice to or knowledge of the occurrence of the injury on the part of the insured employer shall be notice or knowledge thereof, as the case may be, on the part of the insurer; that the jurisdiction of the insured employer for the purpose of the Alaska Workmen's Compensation Act shall be the jurisdiction of the insurer, and the insurer shall, in all things, be bound by and shall be subject to the orders, awards, judgments and decrees rendered against the insured employer under said Act.

(d) (CONDITIONS OF PAYMENT.) That the insurer will promptly pay to the person or persons entitled to the same, all benefits conferred by the Alaska Workmen's Compensation Act, including physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, and all installments of compensation or death benefits that

may be awarded or agreed upon under said Act; that the obligation of the insurer shall not be affected by any default of the insured employer after the injury, or by any default in giving of any notice required by this policy; that the policy is and shall be construed to be a direct promise by the insurer to the person entitled to physician's fees, nurse's charges, fees for hospital services, charges for medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, and hospital supplies, charges for burial, compensation or death benefits, and shall be enforceable in the name of such person or persons.

(e) (NOTICE OF TERMINATION.) That any termination of the policy by cancellation shall not be effective as to the employees of the insured employer covered thereby until ten days after written notice of such termination has been received by the Industrial Board. Provided, however, that if the employer has secured insurance with another insurance carrier, cancellation shall be effective as of the date of such other coverage.

(f) (JOINT LIABILITY.) That all claims for compensation, death benefits, physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, may be made directly against either the employer or the insurer, or both, and the order or award of the Industrial Board may be made against either the employer or the insurer or both.

(g) (REVOCATION BY COMMISSIONER.) That if any insurer shall fail or refuse to pay any final award or judgment (except during the pendency of an appeal) rendered against it, or its insured, or, if it shall fail or refuse to comply with any provisions of this Act, the Insurance Commissioner shall revoke the approval of the policy form, and shall not accept any further proofs of insurance from it until it shall have paid said award or judgment or complied with the violated provision of this Act, and shall have resubmitted its policy form and received the approval thereof by the Insurance Commissioner.

§ 43-3-22. Award to be final and conclusive: Questions of fact: Injunction proceedings: Certification of questions by Board: Advancement on docket: Early determination: Increase in award. An award of the Board, by less than all of the members, as provided in Section 15 (§ 43-3-15 herein), if not reviewed as provided in Section 16 (§ 43-3-16, herein), shall be final and conclusive.

An award by the full Board shall be conclusive and binding as to all questions of fact; but either party to the dispute, within thirty days from the date of such award, if such award is not in accordance with law, may bring injunction proceedings, mandatory or otherwise, against the Industrial Board, to suspend or set aside, in whole or in part, such order or award. Such proceedings shall be instituted in the United States District Court for the district in which the injury occurred. The orders, writs and processes of the court in such proceeding may run, be served, and

be returned in accordance with the rules of said court, but the return day and hearing thereon shall not be later than sixty days after the institution of such proceedings. The payment of the amounts required by such award shall not be stayed pending final decision in any such proceeding unless, upon application for an interlocutory injunction, the court on hearing, after not less than ten days' notice to the parties and the Industrial Board, allows the stay of such payments, in whole or in part, where substantial damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such substantial damage would result to the employer, and specifying the nature of the damage.

The Board, of its own motion, may certify questions of law to said court for its decision and determination.

All such appeals and certified questions of law shall be advanced upon the docket of said court, and shall be determined at the earliest practicable date, without extensions of time for filing briefs.

Any award of the full Board affirmed on court review at the instance of the employer or his insurance carrier may be increased ten per centum by order of the court.

§ 43-3-23. Fees of attorneys and physicians: Approval: Statement of attorney's fees: Effect and payment: Report by physician. The fees of attorneys and physicians, and the charges of nurses and hospitals,

for services under this Act shall be subject to the approval of the Industrial Board. When any claimant for compensation is represented by an attorney in the prosecution of his or her claim, the Industrial Board shall fix and state in the award, if compensation be awarded, the amount of the claimant's attorney's fee. The fee so fixed shall be binding upon both the claimant and his or her attorney, and the employer shall pay to the attorney out of the award, the fee so fixed, and the receipt of the attorney therefor shall fully acquit the employer for an equal portion of the award. The Industrial Board may withhold the approval of the fees of the attending physician in any case until he shall file a report with the Industrial Board on the form prescribed by such Board.

§ 43-3-24. Records and reports of injuries: Contents of report: Violations as misdemeanor: Punishment. Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment. Within one week after occurrence and knowledge thereof, as provided in Sections 12 and 13 (§§ 43-3-12, 43-3-13 herein) of an injury to an employee causing his or her death or absence from work for more than one day, a report thereof shall be made in writing and mailed to the Industrial Board on blanks to be procured from the Board for the purpose.

The said report shall contain the name, nature and location of the business of the employer, the name, age, sex, wages, occupation of the injured employee, the date and hour of the injury and the nature and

cause thereof, and such other information as may be required by the Industrial Board.

Whoever shall fail or refuse to comply with the foregoing provisions, or whoever shall violate any of the provisions of this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than Fifty Dollars nor more than Five Hundred Dollars.

§ 43-3-25. Jurisdiction of courts. No court of this Territory except the United States District Court on review, or the United States Circuit Court of Appeals on appeal, shall have jurisdiction to review, vacate, set aside, reverse, correct, amend or annul any order or award of the Industrial Board or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the Industrial Board in the performance of its duties.

§ 43-3-26. Attachment: Procedure: Affidavit: Contents: Insurance of writ without bond: Form, service, execution and return: Undertaking by defendant: Effect.

(a) (AFFIDAVIT: CONTENTS.) A writ of attachment shall be issued by the Clerk of the Court in which any action for the recovery of damages under the provisions of Section 10 (§ 43-3-10 herein) is pending, or by the United States Commissioner in any such action pending in the court of such Commissioner. Whenever the plaintiff or anyone in his behalf shall make and file an affidavit showing that he or she is entitled to recover compensation from the

defendant, under the provisions hereof, but that such defendant has failed to comply with the provisions of Sections 18 and 19 of this Act (§§ 43-3-18, 43-3-19 herein), and the certificate of the Industrial Board to that effect shall be prima facie evidence of the fact, such affidavit must show all the facts necessary to bring the plaintiff within the provisions hereof, and must further set up all the facts necessary to show that a cause of action exists in favor of the plaintiff and against the defendant for the amount sued for and for which the attachment is sought under the provisions hereof.

(b) (ISSUANCE OF WRIT WITHOUT BOND: FORM, SERVICE, EXECUTION AND RETURN.) Upon filing such affidavit in actions pending as aforesaid with the Clerk of the Court, or, the Commissioner, in actions pending in the court of such Commissioner, the plaintiff shall be entitled to have a writ of attachment issued without filing any bond or other security such writ shall be directed to the marshal and shall in all respects conform to writs of attachment in other cases and shall be issued, served, executed and returned in the same manner that writs of attachment in other cases are now issued, executed and returned.

(c) (UNDERTAKING BY DEFENDANT: EFFECT.) The defendant may, however, file a written undertaking in any pending cause for the benefit of the plaintiff in an amount equal to double the amount sued for, executed by two or more sufficient sureties, to be approved by the Judge or Commissioner in

whose court the action is pending and conditioned that the defendant will pay any judgment that may be awarded against such defendant in the action. No writ of attachment shall issue after such undertaking has been filed by the defendant, and if such undertaking shall be filed after the writ has been issued, such writ shall be quashed and if property has been attached under such writ at the time of the filing of such undertaking, such attachment shall be dissolved and set aside and the property attached and (sic) returned to the defendant.

§ 43-3-27. Physical examination: Submission to: Presence of employee's physician: Privilege: Refusal to submit to examination: Effect: Autopsy: Notice to widow or next of kin. The employee shall after an injury at reasonable times during the continuance of his or her disability, if so requested by his or her employer, or when ordered by the Industrial Board, submit himself or herself to an examination by a physician or surgeon authorized to practice medicine under the laws of the Territory or State in which such employee may be found, furnished and paid for by the employer, or by the Board. The employee shall have the right to have a physician, provided and paid for by himself or herself, present at such examination or examinations. No fact communicated to, or otherwise learned by any physician or surgeon who may have attended or examined the employee, or who may have been present at any examination, shall be privileged, either in the hearings provided for in this Act, or any action to recover damages against any em-

ployer who is subject to the compensation provisions of this Act. If any employee refused to submit himself or herself to any such examination to examinations provided for herein, his or her rights to compensation shall be suspended until such obstruction or refusal ceases, and his or her compensation, during such period of suspension, may, in the discretion of the Industrial Board, or the court determining an action brought for the recovery of damages hereunder, be forfeited.

The employer, or the Industrial Board, shall have the right in any case of death to require an autopsy at the expense of the party requesting same.

No autopsy shall be held in any case without notice first being given to the widow or next of kin, if they reside in the Territory, or their whereabouts can reasonably be ascertained, of the time and place thereof and reasonable time and opportunity given such widow or next of kin to have a representative present to witness the autopsy shall be suppressed on motion duly made to the Industrial Board, or to the Court, as the case may be.

§ 43-3-28. Waiver or exemption from statute forbidden. No agreement by an employee to waive his or her rights to compensation under this Act shall be valid, except as herein elsewhere provided, and no employer or employee shall exempt himself, herself or itself, except in the manner herein elsewhere provided, from the burden or waive the benefits of this Act, by any contract, agreement, rule, regulation or

device, and any such contract, agreement, rule, regulation or device shall be absolutely void.

§ 43-3-29. Claims barred if not filed within two years. Any and all claims for compensation hereunder shall be barred unless a claim for compensation shall be filed with the Industrial Board within two years after the injury, or, if death results therefrom, within two years after such death, after the injury was sustained, or, in the event of mental incapacity, within two years after the removal of such mental incapacity.

§ 43-3-30. Liability of third persons: Proceedings by employer: Subrogation to employee. Where the injury for which compensation is payable hereunder was caused under circumstances creating a legal liability in someone other than the employer to pay damages in respect thereof, the employee may take proceedings against the one so liable to pay damages and against any one liable to pay compensation under this Act, but shall not be entitled to receive both damages and compensation. And if the employee has been paid compensation under this Act, the employer by whom the compensation was paid shall be entitled to indemnity from the person, firm or corporation so liable to pay damages as aforesaid and to the extent of such indemnity shall be subrogated to the rights of the employee to recover damages therefor.

§ 43-3-31. Report of termination of compensation. Every employer paying compensation directly without insurance, and every insurance carrier paying compensation in behalf of an employer, shall, within ten

days from the termination of the compensation period fixed in any award against him or its insured, for an injury or death, either by the approval of an agreement or upon hearing, and within ten days from the full redemption of any such approved agreement or award, by the cash payment thereof in a lump sum or otherwise, as in this Act or by the order or award of the Industrial Board provided, shall make such report or reports as the Industrial Board may require.

§ 43-3-32. Failure to secure payment: Common law defenses abolished: Presumptions. If such employer fails to provide security as required by Sections 18 and 19 (§§ 43-3-18, 43-3-19 herein), such employer shall not escape liability for personal injury sustained by an employee of such employer when the injury sustained arises out of and in the usual course of the employment because:

(1) The employee assumed the risks inherent to or incidental to or arising out of his or her employment or the risks arising from the failure of the employer to provide and maintain a reasonably safe place to work, or the risks arising from the failure of an employer to furnish reasonably safe tools or appliances, or because the employer exercises reasonable care in selecting reasonably competent employees in the business;

(2) That the injury was caused by the negligence of a coemployee.

(3) That the employee was negligent, unless and except it shall appear that such negligence was wilful

and with intent to cause the injury, or was the result of wilful intoxication on the part of the injured party;

(4) In such actions by an employee against an employer for personal injury sustained arising out of and in the course of the employment where the employer has failed to provide the security as required by Sections 18 and 19 (§§ 43-3-18, 43-3-19 herein), it shall be presumed that the injury to the employee was the first result growing out of the negligence of the employer; and that such negligence was the proximate cause of the injury; and in such case the burden of proof shall rest upon the employer to rebut the presumption of negligence.

§ 43-3-33. Presumption of direct payment: Notice: Posting: Places of posting: Form of notice. Every such employer shall be conclusively presumed to have elected to pay compensation directly to employees for injuries sustained arising out of and in the course of the employ- according to the provisions hereof, unless and until notice in writing of insurance, stating the name and address of the insurance company and the period of insurance, shall have been given to the employee. Such notice shall be posted and kept on the premises of the employer or on the premises where the employer's operations are being carried on in three conspicuous places; one of which shall be at the office of the employer; one at the mess house or boarding house, if there be one, and the third in some conspicuous place on the premises or works. Such recorded and posted notice shall be substantially in the

following form, and the signature shall be witnessed by two witnesses:

EMPLOYER'S NOTICE OF INSURANCE

To the employees of the undersigned:

You and each of you are hereby notified that the undersigned is insured in the.....Insurance Company, whose address is.....and that the period covered by such insurance is.....in accordance with the terms, conditions and provisions to pay compensation to employees of the undersigned for injuries received as provided in the Act of the Territory of Alaska, known as the "Workmen's Compensation Act of the Territory of Alaska."

(Signed).....

Witnesses: .....

.....

§ 43-3-34. Article to be part of every contract of hire: Construction. This article shall constitute part of every contract of hire, express or implied, and the same shall be construed as an agreement on the part of the employer to pay and on the part of the employee to accept compensation in the manner hereby provided for all personal injuries sustained, arising out of and in the course of employment.

§ 43-3-35. When excluded employee presumed to accept compensation under this Act: Voluntary Insurance. All employees excluded by the provisions of Section 1 of this Act (§ 43-3-1 herein) shall be conclusively presumed to have elected to take compensa-

tion in accordance with the provisions of Section 33 (§ 43-3-33 herein) in the following cases.

(a) In the event that any employer who employs a person or persons in domestic service, or who is engaged in agriculture, dairying, or the operation of railroads as common carriers, and is, therefore, by reason of the provisions of Section 1 (§ 43-3-1 herein) excluded from the terms, conditions and provisions hereof, voluntarily obtains insurance for the protection of his or its employees for injuries arising out of and in the course of the employment, the rights and remedies hereof shall apply where an employee brings an action or takes proceedings to recover damages or compensation for injuries received growing out of and in the course of his or her employment, and such employee shall be and remain subject to the provisions hereof the same as if such employment had not been excluded by the provisions of Section 1 of this Act (§ 43-3-1 herein).

§ 43-3-36. Alaska Industrial Board created: Members: Chairman: Powers. A Board is hereby created which shall be known as the "Alaska Industrial Board," to be composed of the following three members: The Territorial Insurance Commissioner, the Attorney General and the Territorial Commissioner of Labor. The Commissioner of Labor shall be Chairman of the Alaska Industrial Board, and shall be the executive officer of the Board, and shall be empowered to perform all acts necessary to carry into effect all provisions of this Act.

§ 43-3-37. Assignment of claim: Waiver of exemption. No claim for compensation, or compensation agreed upon, awarded, adjudged, or paid, shall be assignable, or subject to levy, execution, attachment, garnishment, or any other remedy or procedure for the recovery or collection of a debt, and this exemption cannot be waived.

§ 43-3-38. Definition of terms. Wherever the term "employer" is used in this Act, reference is had to the Territory or any of its political subdivisions and to any person or persons, partnership, joint stock company, association or corporation employing three or more persons in connection with any business or industry coming within the scope hereof and carried on in this Territory, and whenever the term "employee" is used herein, reference is had to an employee employed by an employer as above defined.

If the employer is insured, the term "employer" shall include the insurer so far as applicable.

The term "beneficiary" as used herein refers to any person entitled to compensation under the provisions hereof.

The masculine gender, whenever used herein, shall be held to include the feminine and neuter.

For the purpose of this Act, "child" or "children" shall mean a child or children under the age of eighteen years depending upon the injured employee for support.

"Widower" shall include one who is divorced and is not required by decree of divorce to contribute to the support of his former wife.

"Married" shall include one who is divorced but is required by the decree of divorce to contribute to the support of his former wife.

The term "injury" or "personal injury" means an injury by accident arising out of and in the course of employment, including any disease proximately caused by the employment, which is due to causes and conditions that are characteristic of and peculiar to a particular trade, occupation, process or employment, and to exclude all ordinary diseases of life to which the general public are exposed; including, also, any injury caused by the wilful act of a third person directed against the employees because of his or her employment, but shall not include injuries caused by the employee's wilful intention to injure himself or herself or to injure another or caused by his or her wilful intoxication.

§ 43-3-39. Title of Act. This Act shall be cited as "The Workmen's Compensation Act of Alaska."

§ 43-3-40. Separability of Provisions. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

§ 43-3-41. Laws Repealed. This Act shall supersede and repeal all other laws of the Territory relat-

ing to Workmen's Compensation, and Section 2161 to Section 2203, inclusive, Compiled Laws of Alaska 1933,[a] as amended by Chapter 84, Session Laws of Alaska 1935, Chapter 74, Session Laws of Alaska 1937, Chapter 49, Session Laws of Alaska 1939, Chapter 41, Session Laws of Alaska 1941, and Chapter 63, Session Laws of Alaska 1937, are hereby specifically repealed."

[a]Formerly Chapter 25, Session Laws of Alaska 1929.

Appendix B

UNITED STATES OF AMERICA,
TERRITORY OF ALASKA.—SS.

R. E. ROBERTSON, being first duly sworn on oath deposes and says I am attorney for the appellant; that in the absence of the record so showing I state:

(a) Landro's deposition was taken before one or more members of the Board on May 26, 1949.

(b) The hearing was held before the full Board on June 27, 1949.

(c) The Board made its decision and award on June 28, 1949, but the Board did not notify the appellant thereof until July 8, 1949.

(d) Appellant's complaint and appeal was filed with the Clerk of the District Court for the Third Judicial Division on July 28, 1949.

R. E. ROBERTSON.

Subscribed and sworn to before me this 15th day of August, 1950, in Juneau, Alaska.

(Seal) F. O. EASTAUGH,
Notary Public for the Territory of Alaska.
My commission expires June 10, 1954.